148 U.S. 312

RECORD, CASE No. 14,589.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1122~~. 722

THE MONONGAHELA NAVIGATION COMPANY, APPELLANT AND PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED APRIL 24, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 28, 1892.

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1 Among the rolls, records, and judicial proceedings had in the circuit court of the United States for the western district of Pennsylvania in a certain proceeding on behalf of the United States to condemn and appropriate to public use lock and dam No. 7 of the Monongahela Navigation Company may be found the following words and figures, viz:

Docket Entries.

In the Matter of the Condemnation of Lock and Dam No. 7, otherwise known as the Upper Lock and Dam, and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the State laws *of the* of Pennsylvania; which lock and dam and its appurtenances constitute a part of the improvements in water communication in the Monongahela river between Pittsburgh, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia.

Geo. A. Allen, U. S. attorney; Geo. Shiras, Jr., and R. B. Carnahan for Mon. Nav. Co., Dec. 1, 1888.

1888, December 1—Petition of Geo. A. Allen, United States attorney for the western district of Pennsylvania, for and on behalf of the United States, praying for the appointment of seven discreet and disinterested freeholders, as provided by the general railroad law of the State of Pennsylvania, approved February 19, 1849, and its supplements, after such notice to the owners of said lock and dam No. 7, otherwise known as the "upper lock and dam," as the court shall direct, who, after being duly qualified and after such notice to the owner of said property has been given as required by law and as the court may direct, shall estimate and determine the fair value of all and singular the estates and interests in said lock and dam so proposed to be taken by and for use of the United States for public use and designate the owner or owners thereof so far as the same can by them be reasonably ascertained, and report the same to court, presented; and, upon consideration thereof, order granted directing petition to be filed and fixing Tuesday, Dec. 11, 1888, for further hearing thereon. Petition and order filed.

1888, Dec. 11—Answer of the Monongahela Navigation Co. to above petition filed. 1889, Jan'y 2—Replication to defend-
2 ant's answer filed. 1889, Jan'y 22—Arguments had upon petition for appointment of viewers and the answer thereto. C. A. V. 1889, Feb'y 2—Opinion of the court overruling the objections set up in respondent's answer, without prejudice to respondent's right to renew them hereafter, and directing the district attorney to give notice to the respondent's counsel that at a designated day and hour he will move the court to appoint viewers filed.

1889, February 28—Order granted upon the above petition of the U. S. attorney for and on behalf of the United States, appointing George A. Kelley, John M. Sullivan, James M. Bailey, S. S. Graham, James M. Clark, John Dowlin, and Alexander Nimick, seven dis-

creet and disinterested freeholders of the west. dist. Pa., as viewers and appraisers in this case, who, after being duly qualified and notice according to law given by petitioner to the said viewers and the Monongahela Navigation Company, as owners of lock and dam No. 7, of the time of meeting upon the premises by the viewers, shall estimate and determine the fair value of said lock and dam No. 7, as directed by the act of Congress authorizing the condemnation proceedings in this case, and designate the owner or owners thereof as far as the same can by them be reasonably ascertained, and shall report the same to this court; and it is further ordered that the said viewers meet on the premises for the purpose of this appointment on the 21st day of March, 1889, at 10 o'clock a. m., the respective attorneys for the parties concurring that the viewers may be selected from any part of the western district of Pennsylvania. Order filed. 1889, April 20—Su-pœna for witnesses on behalf of the U. S. before the viewers herein, with service thereof endorsed thereon, filed. 1889, May 3—Report of viewers filed by leave of court. Same day, two subpœnas for witnesses on behalf of the U. S., with service endorsed thereon, returned. 1889, May 31—Appeal of the United States from the award of the viewers filed on May 3, 1889, filed.

1889, June 14—Proof of service of order appointing viewers returned served on March 5 to 12 on the viewers named therein and upon the Monongahela Navigation Co. Mar. 19, 18—.

3 *Petition for Condemnation and Order Thereon.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

In the Matter of the Condemnation of Lock and Dam Number Seven, otherwise known as the "Upper Lock and Dam," and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the laws of the State of Pennsylvania; which lock and dam and its appurtenances constitute a part of the improvements in water communication in the Monongahela river between Pittsburg, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia.

To the honorable the judge of said court:

The petition of George A. Allen, United States attorney for the western district of Pennsylvania, for and on behalf of the United States respectfully represents—

That under and by virtue of an act of Congress which became a law on the 10th day of August, 1888, the Secretary of War was authorized and directed to negotiate for the purchase at a cost not to exceed one hundred and sixty-one thousand seven hundred and thirty-three dollars and thirteen cents — lock and dam number seven, otherwise known as the "upper lock and dam," and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the laws of the State of Pennsylvania, which lock and

dam number seven and its appurtenances constitute a part of the improvements in water communication in the Monongahela river between Pittsburgh, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia; and it was further provided in said act that in the event of the inability of the Secretary of War to make voluntary purchase of said lock and dam number seven, otherwise known as the "upper lock and dam," and its appurtenances for the said sum of one hundred and sixty-one thousand seven hundred and thirty-three dollars and thirteen cents, then the said Secretary of War was authorized and directed to institute and carry to completion proceedings for the condemnation of said lock and dam number seven, otherwise known as the "upper
4 lock and dam," and its appurtenances; said condemnation proceedings to be as prescribed and regulated by the provisions of the general railroad law of the State of Pennsylvania, approved February 19th, 1849, and its supplements, except that the United States shall not be compelled to give bond, and except that jurisdiction of said proceedings is given to the circuit court of the United States for the western district of Pensylvania; and it is further provided in said act of Congress that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated.

That the said Secretary of War has been unable, after due endeavor in that behalf, to make voluntary purchase of said lock and dam and its appurtenances.

That in pursuance of instructions and directions from the Honorable William C. Endicott, Secretary of War, and the Honorable A. H. Garland, Attorney General of the United States, acting under and by virtue of said act of Congress, the said United States attorney for the western district of Pennsylvania, on behalf of the said United States, presents this petition to the court for the purpose of instituting and carrying to completion proceedings for the condemnation of the said lock and dam number seven, otherwise known as the "upper lock and dam," and its appurtenances.

That said lock and dam number seven, otherwise know- as the "upper lock and dam," and its appurtenances is the property of the Monongahela Navigation Company, a corporation organized under the laws of the State of Pennsylvania, which lock and dam number seven, otherwise known as the "upper lock and dam," and its appurtenances constitute a part of the improvements in water communication on the Monongahela river between Pittsburg, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia, and that part of the land included in said lock and dam number seven, otherwise known as the "upper lock and dam," is situate in Nicholson township, Fayette county, Pennsylvania, and part thereof is situate in Monongahela township, Greene county, Pennsylvania; and said lock and dam is otherwise described as follows:

Lock number seven is located on the left bank of the Monongahela river, Monongahela township, Greene county, Pennsyl-
5 vania, and about two miles northward or down the river from

the villages of Greensboro' and Geneva; that the end of said dam on the opposite side of said river from said lock is situate in Nicholson township, Fayette county, Pennsylvania; that the length of the dam is five hundred and twenty-five feet; total height, twenty feet; width, fifty feet. These condemnation proceedings herein prayed for are intended to cover and include all the land and real estate and appurtenances belonging to said lock and dam or in anywise appertaining, and to include all that certain piece of real estate conveyed by James M. Parshall, George Porter, and George W. Neff, administrators *d. b. n., c. t. a.*, of Elias Parshall, deceased, by deed dated September 14th, 1885, recorded in the recorder's office in and for the county of Fayette, in the State of Pennsylvania, in Deed Book, vol. 63, p. 509, and which piece of land is more particularly described and bounded as follows:

Beginning on the east side of the Monongahela river at a point one hundred and seventy-five feet distant eastwardly, measured along the line of the upstream edge of dam number seven from a small drill-hole in the abutment masonry of said dam, and running thence by the line of an included angle, turned to the right or northwardly of eighty-four degrees, with a back sight along the upper edge of said dam nine hundred and sixty-nine feet to a point on the northern line of said Parshall's property, near the river bank, thence along said property line eighty-five feet to the original low-water mark on said river, thence by said low-water mark up said river one thousand and twenty feet to a point fifty feet above the upstream edge of said dam and crossing said dam fifty-six feet from said drill-hole from the aforesaid drill-hole in the abutment, and thence by an internal angle of seventy-four degrees and forty minutes two hundred and thirty-one feet to the place of beginning, containing three and seven-tenths acres.

And also including all that other certain piece of land situate in Monongahela township, Greene county, Pennsylvania, bounded and described as follows:

Beginning at the upper inner corner of land at the margin of the Monongahela river, thence north along said river two and one-fourth degrees west twenty rods to a post; thence south eighty-seven
6 and three-fourths degrees west eight rods to a point witnessed by small bushes; thence south two and one-fourth degrees east, twenty and six-tenths rods to a post; thence north eighty-three and three-fourths degrees east eight and one-tenth rods to the place of beginning, containing one acre and two and four-tenths perches, and being the same land purchased from J. R. and S. T. Gray, executors of William Gray, deceased, and being the same land surveyed by A. J. Waychoff on August 25th, 1886; also all and singular any other land not herein specifically described or mentioned and its appurtenances which belong to the said Monongahela Navigation Company and occupied and used as a part of said lock and dam number seven, otherwise known as the "upper lock and dam," of the Monongahela Navigation Company.

Your petitioner therefore prays your honorable court to appoint seven discreet and disinterested freeholders, as provided by the gen-

eral railroad law of the State of Pennsylvania, approved February 19th, 1849, and its supplements, after such notice to the owners of said lock and dam number seven, otherwise known as the "upper lock and dam," as your honor shall direct, who, after being duly qualified and after such notice to the owner of said property has been given as required by law and as your honor may direct, shall estimate and determine the fair value of all and singular the estimates and interests in said lock and dam number seven so proposed to be taken by and for the use of the said United States for public use, and designate the owner or owners thereof, so far as the same can by them be reasonably ascertained, and report the same to your honorable court.

GEO. A. ALLEN,
United States Attorney.

UNITED STATES OF AMERICA, } ss:
Western District of Penns., }

George A. Allen, the above-named petitioner, being duly sworn according to law, doth depose and say that, from information and belief, the facts set forth in the foregoing petition are true and correct.

GEO. A. ALLEN.

Sworn to and subscribed before me this 1st day of December, anno Domini 1888.

H. D. GAMBLE, *Clerk.*

7 And now, December 1, 1888, the within petition presented in open court by Geo. A. Allen, Esq., U. S. attorney, in the presence of Geo. Shiras, Jr., Esq., and R. B. Carnahan, Esq., attorneys for the Monongahela Navigation Co., and it is ordered that the petition be filed and Tuesday, December 11, 1888, at 10 a. m., is fixed for further hearing.

By the court:

H. D. GAMBLE, *Clerk.*

Filed Dec. 1, 1888.

H. D. GAMBLE, *Clerk.*

8 *Answer of the Monongahela Navigation Co. to Petition.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

No. 2. May Term, 1889.

In the Matter of the Condemnation of Lock and Dam Number Seven, otherwise known as the "Upper Lock and Dam," and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the laws of the State of Pennsylvania; which lock and dam and its appurtenances constitute a part of the improvements in water communication in the Monongahela river between Pittsburgh, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia.

To the honorable the judges of said court:

The Monongahela Navigation Company, by Maxwell K. Moorhead, its president, makes answer to the petition of George A. Allen, attorney of the United States for the western district of Pennsylvania, made and filed on behalf of the United States, and says:

First. That the Monongahela Navigation Company is a corporation of the State of Pennsylvania, created and erected into a corporation on the — day of ——, 1837, by the governor of said State, by his letters patent of that date, duly made and issued, under the name and style of "The President, Managers and Company of the Monongahela Navigation Company," in pursuance of the powers granted by the act of the General Assembly of said State, entitled "An act to authorize the governor to incorporate a company to make a lock navigation on the river Monongahela," approved March 31st, 1836, page 262, and said company having been first duly organized by the election of a president, managers, and other officers, to wit, on February 10, 1837, became a corporation of said State, lawfully created and invested with all the powers and authorities, franchises, privileges, rights, and immunities granted to said corporation by the act of the General Assembly aforesaid, and, among other powers and authorities, the right of eminent domain and the lawful power "to enter upon the said River Monongahela * * * and make, erect, and set up any dams, locks, or any other device whatsoever which they shall think most fit and convenient to make a complete slack-water navigation between the points herein mentioned, to wit, the city of Pittsburgh and the Virginia State line," and among the franchises, rights, and privileges so granted is that of demanding, collecting, and receiving tolls for the passage of boats, barges, or other vessels navigating said river through the locks and over the improved navigation of said river, subject, however, to the limitation contained in the tenth section of said act, by which the dividends were limited in amount to nine per centum per annum.

9

By an act of the General Assembly of said Commonwealth, entitled "A supplement to an act entitled An act to authorize the gov-

ernor to incorporate a company to make a lock navigation on the River Monongahela," approved 24th June, 1839, it was enacted (*inter alia*) " The name, style, and title of the said company shall from and after the passage of this act be the " Monongahela Navigation Company," and under said last-mentioned name and style has ever since been and now is a lawfully created corporation of said State of Pennsylvania.

Second. That in virtue and in pursuance of the powers granted to said company by the act providing for its incorporation above referred to, and of the several supplementary acts of the General Assembly of the State of Pennsylvania providing (*inter alia*) for an increased height of the dams to be built, defining the length and breadth of the locks, authorizing additional subscriptions of stock, and the borrowing of money, extending the time for the completion of the improvement, and authorizing dividends on the stock to the amount of twelve per centum per annum, by which and other supplementary legislation the powers of said company were enlarged and extended, the said Monongahela Navigation Company entered upon the Monongahela river and built, constructed, and completed on said river seven dams and eleven locks at said dams, all of which are situated in said State of Pennsylvania, and thereby made, opened for navigation, and maintained and now maintains a complete lock and slack-water navigation from Pittsburgh, in the State of Pennsylvania, to the line of the State of Virginia (now West Virginia), and thereby, being the owner of said property, became and is entitled to charge, demand, and receive reasonable tolls and rates for and in respect to the passage of steamboats, coalboats, flats, barges, and other water craft through said locks and over the pools and slack-water and lock navigation aforesaid, and whether carrying passengers or freight, or both, or without either, subject only to the limitation that the dividends on the stock of the company derived from such tolls, rents, and rates shall not exceed twelve per centum per annum; and the said Monongahela Navigation Company prays that the original act of incorporation of said company and the several supplements thereto be taken and considered as part of this answer.

Third. And the said Monongahela Navigation Company avers that said franchise and right to demand and receive tolls and rates for the use of said lock and slack-water navigation aforesaid is a valuable property of said company and is a large, if not the larger, element in the entire value of the property of said company in said improvement, and said franchise has been daily and constantly exercised and used at and on a part of the works of said company on said river for forty-seven years and on and at all of said works as soon as the same were completed, and is now so exercised and used at, on, and over the seven dams and eleven locks aforesaid which constitute the system of said company's works.

Fourth. That it is true, as averred in the petition, that the Secretary of War was unable, after due endeavor in that behalf, to make a voluntary purchase of lock and dam No. 7 and its appurtenances from said Monongahela Navigation Company. The act of Congress

which became a law on the 10th day of August, A. D. 1888, commonly called the river and harbor bill, authorized and directed the Secretary of War "to negotiate for the purchase at a cost not to exceed one hundred and sixty-one thousand seven hundred and thirty-three dollars and thirteen cents ($161,733.13) of lock and dam No. 7, otherwise known as the "upper lock and dam," and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the laws of the State of Pennsylvania." The maximum sum which the Secretary of War was authorized to offer is the exact amount of the cost of the construction of said lock and dam No. 7, and the value of the company's franchise to collect tolls, as well as the cost of the purchase of land for the con-
11 struction of abutments, &c., for the said dam and lock and damages paid by the company for the overflow of land incident to raising the water of the river to the height of over ten feet, were entirely excluded in fixing the amount to be offered. The company consequently declined to enter into negotiation with the Secretary of War for the sale of the property for the maximum sum authorized to be paid by said act of Congress, the same being much below the real value of the property.

Fifth. And the said Monongahela Navigation Company, by Maxwell K. Moorhead, its president, says that it is advised and believes and hereby avers that the part of said act of Congress which authorizes and directs the Secretary of War to institute and carry to completion proceedings for the condemnation of said lock and dam No. 7 and its appurtenances in this court and by and according to the method therein authorized and providing "that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated," *and* as substantially set forth in the petition, is in conflict with that part of the fifth amendment of the Constitution of the United States which is as follows:

"Nor shall private property be taken for public use without just compensation," in that "the franchise of said corporation to collect tolls" is property in the sense of said amendment and has value, which would be entirely destroyed by the taking of the lock and dam, and that part of said act of Congress is therefore unconstitutional and void.

Sixth. That said act of Congress authorizes the taking of only a part of the property of the said Monongahela Navigation Company in lock and dam No. 7, to wit, the mere physical structures of said lock and dam and appurtenances, thereby destroying the property of said company in the franchise to collect tolls at said lock and dam, which is a valuable property, thus in effect depriving the said Monongahela Navigation Company of its property, to wit, the franchise aforesaid, not only without making compensation, but forbidding compensation to be allowed, estimated, and ascertained by this court in a judicial proceeding, the question of what is and is
12 not property being for the judicial and not the legislative department of the Government to determine, and the part of

the act of Congress above referred to is therefore unconstitutional and void.

Seventh. The act of Congress provides for the taking of a part of the property of said Monongahela Navigation Company in such a way as to deprive another part of said property of equal value at the time of the taking of all value whatever and to entirely destroy the same wothout compensation, paid or secured, and said part of the act is therefore void.

The said Monongahela Navigation Company therefore submits to your honorable court that that part of the act of Congress under which this proceeding has been commenced by petition is unconstitutional and void, and respectfully prays the court to so declare, adjudge, and decree, and to relieve said company from further answer to said petition and to dismiss the same out of this court.

MONONGAHELA NAVIGATION COMPANY,
By MAXWELL K. MOORHEAD, *President.*

13 UNITED STATES, }
West. Dist. of Penna. }

Maxwell K. Moorhead, having been duly sworn, says that he is president of the Monongahela Navigation Company, and as such has made the foregoing answer to the petition in this case on behalf of and as representing said company, and that the facts set forth therein are true and correct as he verily believes.

MAXWELL K. MOORHEAD.

Sworn and subscribed before me this 10th day of Dec., 1888.

H. D. GAMBLE, *Clerk.*

Filed Dec'r 11th, 1888.

H. D. GAMBLE, *Clerk.*

14 UNITED STATES *vs.* THE MONONGAHELA NAVIGATION COMPANY. } *In Re* Condemnation of Lock and Dam Number Seven. In the U. S. Circuit Court, W. D. Pa.

Replication.

The repliant, saving and reserving all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says:

1. That the proviso in the act of Congress referred to and stated in the petition and answer is constitutional and valid.

That the right and power of the United States to regulate commerce upon and over the Monongahela river between the States of Pennsylvania and West Virginia, through which State- the said navigable river flows, was a paramount legal existing right at the time said Monongahela Navigation Company accepted and received from the Commonwealth of Pennsylvania the franchise or right to take and receive tolls for the use of lock and dam number 7, and

that such franchise or right was taken and accepted subject to the right of the United States to take and assume control and authority over the said Monongahela river or any part thereof for the purpose of regulating commerce between any of the several States, at any time the United States might deem it expedient (through its legislative power) to assert and exercise such right.

2. That the condemnation proceedings under said act of Congress will not affect the value of any property of the Monongahela Navigation Company other than the said lock and dam number 7 and the right to take tolls for its use, and any and all statements to the contrary contained in said answer are denied.

3. That a franchise is not such property as is contemplated in the fifth amendment to the Constitution, which provides for compensation for private property taken for public use.

4. That a disturbance of the franchise which may be caused by the condemnation proceedings in this case will not be a taking of private property for public use within the meaning of the 5th amendment of the Constitution of the United States.

G. A. ALLEN,
U. S. Att'y, for the United States.

Filed Jan'y 2, 1889.

H. D. GAMBLE, *Clerk.*

15 *In Re* Condemnation of Lock and Dam No. 7 of the Monongahela Navigation Company. } No. 2. May Term, 1889.

Suranswer to Petition.

ACHESON, *J.:*

The court would not be justified in arresting this proceeding at this preliminary stage unless it clearly appeared that the legislation upon which it is based is unconstitutional, and that the objectionable proviso is so inseparable from the body of the act that the whole must fall; but the principal question seems to be new, and, as here presented, it can hardly be said that it is free from all doubt, nor is it clear to me that the proviso, if held to be void, may not be eliminated from the statute so as to save the main purpose of the law. These questions, it seems to me, can be more properly raised and satisfactorily determined at a later period in the proceeding than now. For the present, then, the court will overrule the objections set up in the answer without prejudice to the respondent's right to renew them hereafter.

Let the district attorney give notice to the respondent's counsel that, at a designated day and hour, he will move the court to appoint viewers.

Filed Feb'y 2, 1889.

H. D. GAMBLE, *Clerk.*

16 In the Circuit Court of the United States, Western District of Penna.

In the Matter of the Condemnation of Lock and Dam No. 7 of the Monongahela Navigation Company. } No. 2. May Term, 1889.

And now, February 28th, 1889:

Whereas a petition was presented to this court on the 11th day of December, 1888, by the United States attorney for and on behalf of the United States, praying for the appointment of seven discreet and disinterested freeholders under and by virtue of a statute of the United States, which became a law of the United States on the 10th day of August, 1888, to estimate and determine the value of lock and dam No. 7, otherwise known as the "upper lock and dam," upon the Monongahela river, situate in the western district of Penna., and fully and at large described in said petition, and due notice having been given of the said application to the Monongahela River Navigation Company, the present owner of the said lock and dam No. 7, and the said company having appeared by its attorneys, and a hearing had upon said petition on the 22d day of January, 1889, before this court, it is now ordered that George A. Kelly, John M. Sullivan, James M. Bailey, S. S. Graham, James M. Clark, John Dowlin, and Alexander Nimick, seven discreet and disinterested freeholders of the said western district of Penna., be, and they are hereby, appointed viewers and appraisers in this case, and who, after having been duly qualified and notice according to law given, by the petition to the said viewers and to the other party, to wit, the Monongahela River Navigation Company, as owner of the said lock and dam No. 7, of the time of meeting upon the premises by the viewers, shall estimate and determine the fair value of said lock and dam No. 7, as directed by the said act of Congress authorizing the condemnation proceedings in this case, and designate the owner or owners thereof as far as the same can by them be reasonably ascertained, and shall report the same to this court; and it is further ordered that the said viewers meet on the premises for the purpose of this appointment on the 21st day of March, 1889, at ten o'clock a. m.; the respective attorneys for the parties concurring, that the viewers may be selected from any part of the western district of Penna.

BY THE COURT.

Filed Feb'y 28, 1889.

H. D. GAMBLE, *Clerk.*

17 In the Circuit Court of the United States, Western District of Penna.

In the Matter of the Condemnation of Lock and Dam No. 7 of the Monongahela Navigation Co. } No. —.

And now, February 25th, 1889—

W-ereas a petition was presented to this court on the 11th day of December, 1888, by the United States attorney for and on behalf

of the United States, praying for the appointment of seven discreet and disinterested freeholders, under and by virtue of a statute of the United States, which became a law of the United States on the 10th day of August, 1888, to estimate and determine the value of lock and dam No. 7, otherwise known as the "upper lock and dam," upon the Monongahela river, situate in the western district of Penna., and fully and at large described in said petition, and due notice having been given of the said application to the Monongahela River Navigation Company, the present owner of the said lock and dam No. 7, and the said company having appeared by its attorneys and a hearing had upon said petition on the 22d day of January, 1889, before the court, it is now ordered that George A. Kelly, John M. Sullivan, James M. Bailey, S. S. Graham, James M. Clark, John Dowlin, and Alexander Nimick, seven discreet and disinterested freeholders of the said western district of Penna., be, and they are hereby, appointed viewers and appraisers in this case, and who, after having been duly qualified and notice, according to law, given by the petitioner to the said viewers and to the other party, to wit, the Monongahela River Navigation Company, as owner of the said lock and dam No. 7, of the time of meeting upon the premises by the viewers, shall estimate and determine the fair value of said lock and dam No. 7, as directed by the said act of Congress authorizing the condemnation proceedings in this case, and designate the owner or owners thereof, as far as the same can by them be reasonably ascertained, and shall report the same to the court; and it is further ordered that the said viewers meet on the premises for the purpose of their appointment on the 21st day of March, 1889, at ten o'clock a. m., the respective attorneys for the parties
18 concurring, — that the viewers may be selected from any part of the western district of Penna.

BY THE COURT.

[L. S.] Certified from the record this 1st day of March, 1889.

H. D. GAMBLE, *Clerk.*

Service of foregoing order and of the time of meeting acknowledged.

GEORGE A. KELLY.
JAMES M. BAILEY.
JOHN M. SULLIVAN.
J. MURRY CLARK.
JOHN DOWLIN.
S. S. GRAHAM.
ALEX. NIMICK.

Service of the within order is hereby accepted for the Monongahela Navigation Company.

R. B. CARNAHAN,
Att'y for said Company.

Pittsburgh, March 12th, 1889.

Returned and filed June 14, 1889.

H. D. GAMBLE, *Clerk.*

19 In the Circuit Court of the United States, West'n Dis's of Penna.

In the Matter of the Condemnation of Lock and Dam Number Seven of the Monongahela Navigation Company. } No. 2. May Term, 1889.

To the honorable the judge of the said court:

The undersigned viewers, appointed to estimate and determine the fair value of lock and dam number seven of the Monongahela Navigation Company, sought to be condemned in this proceeding, beg leave to report as follows:

First. In pursuance of the order of your honorable court, and after being first duly sworn and qualified according to law, and after due notice to the owner and claimant, as prescribed by law, we met upon the premises sought to be condemned, on the 21st day of March, anno Domini 1889, and proceeded to inspect the same and to ascertain the fair value thereof and to ascertain the owner or owners thereof.

Second. That we found a large portion of the works and premises sought to be condemned entirely covered by the waters of the Monongahela river, which rendered it impossible for us to learn or acquire any definite knowledge of the value thereof without taking the testimony of witnesses who had knowledge of the dimensions and character of the structure, and we accordingly took the testimony of a number of witnesses for this purpose, the Government of the United States and the Monongahela Navigation Company being represented at each meeting of the viewers by their attorneys, and, in the performance of our duties, we met on the following days, to wit:

March 20th, 1889, met at the office of H. D. Gamble, clerk of the United States circuit court, at Pittsburgh, and were sworn; proceeded from there to lock and dam number 7 on board the steamer "Jacobs," arriving at and viewing the premises on March 21st, 1889; after viewing the premises, heard the testimony of one witness and adjourned.

Met on Monday, April 6, 1889, at the office of the Monongahela Navigation Company, Diamond St., Pittsburgh, Pa., and heard the testimony of several witnesses.

Met again on April 9, 1889, at same place and continued
20 the taking of testimony of various witnesses.

Met, pursuant to adjournment, on April 17, 1889, at the office of the United States attorney, Pittsburgh, Pa., and closed the testimony on behalf of the Monongahela Navigation Company.

Met again on April 18th, 1889, at the office of the Monongahela Navigation Company, Grant St., Pittsburgh, and heard the testimony of witnesses on behalf of the Government.

Pursuant to adjournment, met again on Friday, April 19th, 1889, at the same office, and closed the testimony of both sides; also heard the arguments of counsel for the Government and the navigation company, and adjourned to meet at 7.30 the same evening. At said

meeting a further adjournment was had till May 1st, 1889, at the office of Alexander Nimick, one of the said viewers; and thereupon a further adjournment was taken till May 2nd, 1889, at the office of the district attorneys, and, after consultation, we unanimously report and find as follows:

Third. That lock and dam number seven of the Monongahela Navigation Company is situate on the Monongahela river, in the State of Pennsylvania, about two miles northward or down the river from the villages of Greensboro' and Geneva.

Fourth. That lock number seven is on the left bank of the Monongahela river and in Monongahela township, Greene county, Pennsylvania, and the abutment of the dam is on the opposite shore, in Nicholson township, Fayette county, and State of Pennsylvania.

Fifth. That the lock and dam are situate in the bed of the Monongahela river and within the lines of high-water mark of the same; that the said lock and dam and their appurtenances are accurately set forth and described in the petition presented and filed in this case asking for the appointment of viewers; and we find that the said Monongahela Navigation Company, a corporation organized under the laws of the Commonwealth of Pennsylvania, in possession thereof, and that the said Monongahela Navigation Company is the owner in fee of all said lock and dam and their appurtenances, excepting that portion of real estate situate on the left bank of the river eastwardly from the lock of dam number seven, in Monongahela township, Greene county, Pennsylvania, consisting of about one acre and two perches, more or less, on which is erected a lock-house, and as to the owner of the same we report
21 as follows, to wit: When said lock and dam were constructed in 1882, 1883, and 1884, possession of said lot was taken by the said Monongahela Navigation Company, with the consent of William Gray, owner thereof. A lock-house was thereafter constructed at a cost of $—, and after the death of William Gray, the owner of said land, Robert Gray, the executor of the said William Gray and one of the heirs-at-law, agreed upon two hundred ($200) dollars as a price to be paid for said land.

No deed of conveyance has never been made of the land to the said Monongahela Navigation Company and no purchase-money paid.

Sixth. That we find the value of said lock and dam No. seven and its appurtenances to be two hundred and nine thousand three hundred and ninety-three — & fifty-two cents ($209,393.52) *dollars.*

Respectfully submitted.

JOHN M. SULLIVAN.
GEORGE A. KELLY.
ALEX. NIMICK.
S. S. GRAHAM.
JOHN DOWLIN.
J. MURRY CLARK.
JAMES M. BAILEY.

Filed May 3, 1889, by leave of court.

H. D. GAMBLE, *Clerk.*

22 In the Circuit Court of the United States, Western District of Penna.

In the Matter of the Condemnation of Lock and Dam No. 7, Otherwise Known as the "Upper Lock and Dam," and its Appurtenances of the Monongahela Navigation Company. } No. 2. May Term, 1889.

And now, May 31st, 1889, comes the United States, by Geo. A. Allen, attorney for the United States, and appeals from the award of the viewers reported and filed in the above-stated case on the 3d day of May, 1889, to the circuit court of the United States for the western district of Pennsylvania.

GEO. A. ALLEN,
Attorney for United States.

UNITED STATES OF AMERICA, *Western District of Penna.*, } *ss:*

Before the subscriber, clerk of the circuit court of the United States in and for the western district of Penna., personally came Geo. A. Allen, attorney for the United States, who, being duly sworn according to law, deposeth and saith that the appeal in the above-stated case is not taken for the purpose of delay, but because injustice has been done, as he firmly believes.

GEO. A. ALLEN.

Sworn and subscribed *coram*—

H. D. GAMBLE, *Clerk.*

May 31, 1889.

Filed May 31, 1889.

H. D. GAMBLE, *Clerk.*

23 *Docket Entries on Appeal.*

R. B. Carnahan, George Shiras, Jr., for Mon. Nav. Co. Walter Lyon, U. S. att'y.

Statement and declaration of the Monongahela Navigation Company filed March 31, 1890. Same day, plea of "not guilty" on behalf of the United States filed. 1890, May term, trial continued.

1890, Nov'r 15.—Agreement of counsel to waive a jury and to try and determine the issues by the court without the intervention of a jury filed. 1890, Dec. 2.—Case called for trial before the court without the intervention of a jury in pursuance of above agreement of counsel. Dec'r 3.—Trial proceeds. Dec'r 4.—Trial proceeds; offer A on part of the navigation Co. filed. Dec'r 5.—Trial proceeds. Dec'r 6.—Trial proceeds; evidence on both sides closed and trial adjourned until Dec. 9, 1890, at 10 a. m. 1890, Dec. 9.—Arguments made C. A. V.

1890, Dec'r 24.—Points presented on part of the United States and answers of the court thereto filed; same day, request for findings of

law by the counsel for the Monongahela Navigation Company and answer of the court thereto filed; also the Monongahela Navigation Company's requests for findings of fact and the findings of the court in response thereto filed; also findings of the court as to compensation, awarding to the Monongahela Navigation Company the sum of two hundred nine thousand dollars ($209,000.00) to be paid by the United States for the said lock and dam No. 7 and its appurtenances, with order directing judgment to be entered upon the finding at the end of four days unless in the meantime a motion for a new trial should be entered *sec. reg.*, filed. And now, to wit, December 31, 1890, judgment is hereby entered upon the finding of the court for the sum of $209,000. H. D. Gamble, clerk. 1891, January 19.—Bill of exceptions, signed and sealed by Hon. M. W. Acheson, J., filed. 1891, Mar. 17.—Bill of costs of the Monongahela Navigation Co. filed. 1891, April 8.—Appeal from judgment above to the U. S. Supreme Court, returnable on May 4, 1891, allowed by Hon. J. H. Reed, J.; same day, writ of error from said judgment, returnable at same time and place, allowed by Hon. J. H. Reed; also citation signed. 1891, April 9.—Service accepted by Walter Lyon.

24 *Statement and Declaration on Appeal.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

In Re Proceedings of the United States to Condemn and Appropriate to Public Use Dam and Lock No. 7 of the Monongahela Navigation Company.

WEST. DIST. OF PENNA., *ss:*

Now come the Monongahela Navigation Company, a corporation of the State of Pennsylvania, by Robert B. Carnahan and George Shiras, Jr., their attorneys, and complain of the United States, for that whereas the said The Monongahela Navigation Company have heretofore, in pursuance of authority duly vested in them by law, constructed and now own and use as part of their system of public works a certain dam and lock, known as lock and dam No. 7, extending from the right bank of the Monongahela river, in —— township and Fayette county, to the left bank of said river, in —— township and Greene county, of the State of Pennsylvania, which said lock and dam are of great value, to wit, of the value of $500,000.00, and constitute a necessary part of said company's works, extending on the Monongahela river from the city of Pittsburgh to and near the line between the States of Pennsylvania and West Virginia; and whereas the United States, in pursuance of the provisions of a certain act of Congress entitled "An ——," *our* proceeding to condemn and appropriate to their own use said lock and dam No. 7, and have failed and refused to make just compensation to the said The Monongahela Navigation Company for their said lock and dam No. 7, now a right hath accrued to the said The Monongahela Navigation Company to have and demand of and from

the United States as and for just compensation the value of said lock and dam No. 7, to wit, the value of $500,000.00, wherefore the said The Monongahela Navigation Company, by their said attorneys, file this their claim and statement under the said condemnation proceedings in manner and form as prescribed by the law in such case made and provided.

R. B. CARNAHAN,
GEORGE SHIRAS, JR.,
Attorneys of the Monongahela Navigation Co.

Filed March 31, 1890.

H. D. GAMBLE, *Clerk.*

25 *Plea.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

In Re Condemnation of Dam and Lock No. 7 of the Monongahela Navigation Company.

And now, to wit, March 31, 1890, the United States, by its attorney, to the declaration and statement filed by the Monongahela Navigation Company in the above case pleads "Not guilty."

WALTER LYON,
United States Attorney for the West. Dist. of Pa.

Filed March 31, 1890.

H. D. GAMBLE, *Clerk.*

26 *Agreement to Waive Jury.*

In Re Proceedings of the United States to Condemn and Appropriate to Public Use Dam and Lock No. 7 of the Monongahela Navigation Company.

And now, to wit, November 15th, 1890, it is hereby agreed and stipulated by and between Walter Lyon, district attorney of the United States and attorney of record for the United States in the above proceedings, and George Shiras, Jr., attorney of record for the Monongahela Navigation Company, to waive a jury and to try and determine the issues by the court without the intervention of a jury.

WALTER LYON,
Att'y for United States.
GEORGE SHIRAS, JR.,
Att'y for the Monongahela Navigation Co.

Filed November 15th, 1890.

H. D. GAMBLE, *Clerk.*

27 *Offer A on the Part of Monongahela Navigation Company, &c.*

In the course of the trial of the issue formed under the proceedings to condemn "lock and dam No. 7" of the Monongahela Navi-

gation Company the counsel for the company called William Bakewell as a witness on behalf of the company and proposed to move by him and other witnesses—

That the paid-up capital stock of the Monongahela Navigation Company consists of 32,039 shares of $50 —; that dividends have been declared on the stock for a number of years at the rate of 12 per cent. per annum; that the tolls secured by said company for the use of its works, including lock and dam No. 7, have averaged for several years past not less than $240,000; that the market value of the stock was at the time of the inception of these proceedings about $100 per share; that the money value of their entire works and franchises is not less than four millions of dollars; that the actual toll receipts of lock and dam No. 7 for several years past have exceeded $2,800 per annum, and that a very large increase of said toll receipts at lock and dam No. 7 will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam.

That by the construction and maintenance of the company's works a permanent and reliable public highway has been created on which a large and increasing carriage of coal and general merchandise takes place, and that permanent navigation for the largest vessels and steamboats now exists from the city of Pittsburgh, Pa., to or near the line between the States of Pennsylvania and West Virginia.

That in view of the present and prospective tolls receivable at "lock and dam No. 7" the present value of said "lock and dam No. 7" is not less than $450,000, said value being predicated upon said present and prospective tolls; that said "lock and dam No. 7" are a portion of said company's works, which consist of seven dams, each furnished with a lock or locks.

That the navigation which is sought by these proceedings to be made free was mainly created and made possible at all seasons by the construction and maintenance of the company's works.

That a large portion of the tolls received by the company is charged upon merchandise and articles carried between points
28 of shipment and delivery entirely within the State of Pennsylvania and constituting internal commerce of said State, and that a portion of the tolls collectable at "lock and dam No. 7" for the use of said lock and dam is chargeable for merchandise, goods, and passengers carried between points of shipment and delivery in the State of Pennsylvania, the transportation being wholly within the State as to said portion.

To the foregoing offer counsel for the United States objects for the reason that the same is incompetent and irrelevant, and thereupon the objection is sustained and the evidence rejected; to which ruling the Monongahela Navigation Company excepts, and this bill of exceptions is sealed for and at the instance of the said company.

M. W. ACHESON, *Judge.*

Filed Dec'r 4, 1890.

H. D. GAMBLE, *Clerk.*

29 *Minutes of Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

In the Matter of the Proceedings on Behalf of the United States to Condemn and Appropriate to Public Use *use* Lock and Dam No. 7 of the Monongahela Navigation Company.

And now, to wit, December 2, 1890, the above case being at issue, and a jury having been by agreement of counsel waived, and the cause be tried by the court without the intervention of a jury, George Shiras, Jr., Esq., opens case to the court on behalf of the Monongahela Navigation Company, and thereupon said company proceeds to call witnesses on its behalf.

December 3rd, trial proceeds, the Monongahela Navigation Co. continuing to offer evidence. December 4, trial proceeds; the evidence-in-chief on behalf of the Monongahela Navigation Co. closed at 3 p. m., whereupon Walter Lyon, Esq., United States attorney, opens on behalf of the United States and proceeds to offer evidence until the hour of adjournment.

December 5, trial proceeds; the evidence on behalf of the United States closed at 3.30 p. m., when the Monongahela Navigation Co. proceeds to offer evidence in rebuttal till the hour of adjournment.

December 6, trial proceeds; the Monongahela Navigation Co. closes its rebutting evidence at 12 m., when the United States offers evidence in its behalf, and at 2.25 p. m. counsel on both sides announce to the court that the evidence is closed.

December 8, case a-grued by George Shiras, Jr., Esq., and Johns McCleave, Esq., on behalf of the Monongahela Navigation Co., and by Walter Lyon, Esq., on behalf of the United States, C. A. V.

December 24, 1890, finding of the court awarding to the Monongahela Navigation Company the sum of $209,000 for lock and dam No. 7 and the appurtenances, with order directing judgement thereon after four days if no motion for a new trial is entered.

And now, to wit, December 31, 1890, judgment is hereby entered upon the finding of the court for the sum of $209,000.

H. D. GAMBLE, *Clerk.*

30 *In Re* Condemnation of Lock and Dam No. 7 of the Monongahela Navigation Co. by United States.

Points Presented on Part of the United States and Answer of the Court Thereto.

The court is respectfully requested on the part of the United States to hold—

First. That the Monongahela river is and was prior to the construction of the works of the Monongahela Navigation Company thereon a navigable river of the United States and was used as such by the public.

gation Company the counsel for the company called William Bakewell as a witness on behalf of the company and proposed to move by him and other witnesses—

That the paid-up capital stock of the Monongahela Navigation Company consists of 32,039 shares of $50 —; that dividends have been declared on the stock for a number of years at the rate of 12 per cent. per annum; that the tolls secured by said company for the use of its works, including lock and dam No. 7, have averaged for several years past not less than $240,000; that the market value of the stock was at the time of the inception of these proceedings about $100 per share; that the money value of their entire works and franchises is not less than four millions of dollars; that the actual toll receipts of lock and dam No. 7 for several years past have exceeded $2,800 per annum, and that a very large increase of said toll receipts at lock and dam No. 7 will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam.

That by the construction and maintenance of the company's works a permanent and reliable public highway has been created on which a large and increasing carriage of coal and general merchandise takes place, and that permanent navigation for the largest vessels and steamboats now exists from the city of Pittsburgh, Pa., to or near the line between the States of Pennsylvania and West Virginia.

That in view of the present and prospective tolls receivable at "lock and dam No. 7" the present value of said "lock and dam No. 7" is not less than $450,000, said value being predicated upon said present and prospective tolls; that said "lock and dam No. 7" are a portion of said company's works, which consist of seven dams, each furnished with a lock or locks.

That the navigation which is sought by these proceedings to be made free was mainly created and made possible at all seasons by the construction and maintenance of the company's works.

That a large portion of the tolls received by the company is charged upon merchandise and articles carried between points
28 of shipment and delivery entirely within the State of Pennsylvania and constituting internal commerce of said State, and that a portion of the tolls collectable at "lock and dam No. 7" for the use of said lock and dam is chargeable for merchandise, goods, and passengers carried between points of shipment and delivery in the State of Pennsylvania, the transportation being wholly within the State as to said portion.

To the foregoing offer counsel for the United States objects for the reason that the same is incompetent and irrelevant, and thereupon the objection is sustained and the evidence rejected; to which ruling the Monongahela Navigation Company excepts, and this bill of exceptions is sealed for and at the instance of the said company.

M. W. ACHESON, *Judge.*

Filed Dec'r 4, 1890.

H. D. GAMBLE, *Clerk.*

29 *Minutes of Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

In the Matter of the Proceedings on Behalf of the United States to Condemn and Appropriate to Public Use *use* Lock and Dam No. 7 of the Monongahela Navigation Company.

And now, to wit, December 2, 1890, the above case being at issue, and a jury having been by agreement of counsel waived, and the cause be tried by the court without the intervention of a jury, George Shiras, Jr., Esq., opens case to the court on behalf of the Monongahela Navigation Company, and thereupon said company proceeds to call witnesses on its behalf.

December 3rd, trial proceeds, the Monongahela Navigation Co. continuing to offer evidence. December 4, trial proceeds; the evidence-in-chief on behalf of the Monongahela Navigation Co. closed at 3 p. m., whereupon Walter Lyon, Esq., United States attorney, opens on behalf of the United States and proceeds to offer evidence until the hour of adjournment.

December 5, trial proceeds; the evidence on behalf of the United States closed at 3.30 p. m., when the Monongahela Navigation Co. proceeds to offer evidence in rebuttal till the hour of adjournment.

December 6, trial proceeds; the Monongahela Navigation Co. closes its rebutting evidence at 12 m., when the United States offers evidence in its behalf, and at 2.25 p. m. counsel on both sides announce to the court that the evidence is closed.

December 8, case argued by George Shiras, Jr., Esq., and Johns McCleave, Esq., on behalf of the Monongahela Navigation Co., and by Walter Lyon, Esq., on behalf of the United States, C. A. V.

December 24, 1890, finding of the court awarding to the Monongahela Navigation Company the sum of $209,000 for lock and dam No. 7 and the appurtenances, with order directing judgement thereon after four days if no motion for a new trial is entered.

And now, to wit, December 31, 1890, judgment is hereby entered upon the finding of the court for the sum of $209,000.

H. D. GAMBLE, *Clerk.*

30 *In Re* Condemnation of Lock and Dam No. 7 of the Monongahela Navigation Co. by United States.

Points Presented on Part of the United States and Answer of the Court Thereto.

The court is respectfully requested on the part of the United States to hold—

First. That the Monongahela river is and was prior to the construction of the works of the Monongahela Navigation Company thereon a navigable river of the United States and was used as such by the public.

Answer *per curiam.* This point is affirmed.

Second. As to navigable streams in the United States which are waterways of interstate commerce, the right of a State being subject to the paramount rights of the United States, the Monongahela Navigation Company, deriving whatever right it has from the State of Pennsylvania, can have no higher rights than the State itself.

Answer *per curiam.* This point affirmed.

Third. The right of said navigation company to maintain in the Monongahela river locks and dams is determinable at the pleasure of the National Government.

Answer *per curiam.* This point affirmed.

Fourth. That under the act of Congress of the United States under which the proceedings in this case are instituted no compensation can be allowed said navigation company for the franchise of said company to collect tolls, and in this regard the act was a constitutional exercise of the powers of Congress.

Answer *per curiam.* This point is affirmed.

Filed December 24, 1890.

H. D. GAMBLE, *Clerk.*

31 Circuit Court of the United States for the Western District of Penna.

In the Matter of the Proceedings to Condemn "Lock and Dam No. 7."

The Monongahela Navigation Company's Request for Findings of Fact and the Findings of the Court in Response Thereto.

The parties, having, by a written stipulation between their attorneys of record, waived a trial by jury and submitted the trial of the issue to the court, and the evidence on both sides having been adduced, the Monongahela Navigation Company, by their counsel, request the court to find, from the evidence—

1st. That the Monongahela Navigation Company is a corporation of the State of Pennsylvania, created by the act of March 31st, 1836, and numerous supplements, for the purpose of constructing and maintaining an artificial navigation of the Monongahela river by means of locks and dams within the limits of the State of Pennsylvania, and with the right to collect tolls for the use of said locks and dams.

Answer. The court so finds.

2nd. That, in pursuance of the powers so granted by the State of Pennsylvania, the said company has constructed seven dams, each furnished with one or more locks, which form an existing system of navigation, extending from "lock and dam No. one," at the city of Pittsburgh, to "lock and dam No. seven," near the line between the State of Pennsylvania and West Virginia.

Answer. The court so finds.

3rd. That the navigation of the Monongahela river, prior to the construction of said company's works, was restricted to the use of

small vessels at the time of freshets and of small steamboats, not exceeding a tonnage of 50 tons, which could only ascend the river at limited and uncertain times; that the trade and commerce on said river, prior to its improvement by the company's work-, was insignificant, particularly in the articles of coal, for which the
32 river did not, in its natural condition, furnish sufficient harbors or places of shipment.

That by the construction and maintenance of the said company's works there has been created an existing navigation for large steamboats at all seasons of the year and facilities for a large commerce, particularly in the article of coal, of which there is now transported in a single day as much as was, before the construction of the company's works, transported in an entire year.

Answer. The court finds the facts to be as follows, namely: Prior to the construction of said company's works—that is to say, prior to the year 1841—the navigation of the Monongahela river was conducted altogether in small vessels, including small steamboats of not exceeding a tonnage of fifty tons, which could not ascend the river at all seasons of the year, but only during limited periods of the year, depending on the rises in the river. The trade or commerce on said river prior to its improvement by said company's works was small, particularly in the article of coal, for which the river, in its natural condition, did not furnish sufficient harbors or places of shipment at all seasons of the year; but by the construction and maintenance of the said company's works there has been created an existing navigation for large steamboats at all seasons of the year and facilities for a large commerce, particularly in the article of coal, of which there is now transported in a single day as much as was, before the construction of the company's works, transported in an entire year.

4th. That "lock and dam No. 7" was constructed under and by virtue of the powers granted by the act of March 31st, 1836, and its supplements, and particularly in pursuance of the act of assembly of the State of Pennsylvania approved April 8th, 1857, which was in the following terms:

"Further supplement to the act incorporating the Monongahela Navigation Company," approved March 31, eighteen hundred and thirty-six.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General As-
33 sembly met, and it is hereby enacted by the authority of the same,

That whenever the construction of sufficient locks and dams to extend the slack water on the Monongahela river from the Pennsylvania State line to Morgantown, in Monongalia county, Virginia, shall have been commenced, it shall be the duty of the Monongahela Navigation Company to commence the construction of lock and dam number seven, in such manner and on such plan as will extend the navigation from its present terminus to the Virginia State line, and complete the same simultaneously with the comple-

tion of the work extending to Morgantown; that so much of all acts heretofore passed as have reference to the time of completion of said improvement to the Virginia State line be, and the same are hereby repealed."

Answer. The court so finds.

5th. That the following correspondence took place between the president of the Monongahela Navigation Company and Col. Wm. E. Merrill, who had charge, as engineer, of the public works of the United States on the rivers Monongahela, Allegheny, and Ohio:

"U. S. ENGINEER OFFICE, No. 82 WEST THIRD ST.,
CINCINNATI, OHIO, *November 6th*, 1878.

To the president and directors of the Monongahela Navigation Company, Pittsburgh, Pa.

GENTLEMEN: Understanding it to be your desire that the United States should build a lock and dam on the Monongahela at or near the mouth of Dunkard's creek, in the State of Pennsylvania, and consequently upon a portion of the river where your company hold exclusive privileges by virtue of various acts of the legislature of said State, I would therefore respectfully request that you execute and forward to this office such legal documents pertinent to the case as will transfer to the U. S. whatever rights your company may have to build a lock and dam in the above-named vicinity.
34 I would also request a formal agreement from your company to begin work on your own lock and dam No. 7 as soon as the United States shall begin work on the lock and dam in the vicinity of Dunkard's creek.

Respectfully, your obedient servant,

WM. E. MERRILL,
Major Engineers & Bvt. Col.

OFFICE OF MONONGAHELA NAVIGATION CO.,
PITTSBURGH, *Nov'r 15th*, 1878.

Col. Wm. E. Merrill, major of engineers & bvt. col.

DEAR SIR: Yours of the 6th inst. was received the day after the last meeting of our board. At the next meeting, Dec. 4, I will lay it before them and give you an official reply. I have, however, consulted our solicitor and several members of the board, and have no hesitation in assuring you we will execute a release, transfer, or quitclaim to the U. S. of all rights granted to us by the State of Penna. so far as said rights and obligations apply to that portion of the river above the mouth of Dunkard creek or such point as the Government may select in that vicinity, provided the Gov't will proceed to construct a slack-water navigation from said point to the West Virginia State line and thence to Morgantown, W. Va. We will also, if desired by the U. S., extend our release downward to the mouth of Jacob's creek, where our company have located lock and dam No. 7. We will also enter into an agreement with the U. S., if

they desire it, that upon there being sufficient appropriations made by Congress to secure the completion of a lock and dam in the vicinity of Dunkard creek, and said work having been definitely located and commenced, that we will construct and complete our lock and dam No. 7, so that the navigation can be opened simultaneous- on both. If you have any peculiar form or syyle with regard to these papers, please send me such suggestions as you may think proper, so that I may have them before our next meeting.

Respectfully yours, J. K. MOORHEAD,
Pres't Mon. Nav. Co."

35 "U. S. ENGINEER OFFICE,
No. 82 WEST THIRD ST.,
CINCINNATI, O., *November 25th*, 1878.

Gen. J. K. Moorhead, Pittsburgh, Pa.

GENTLEMEN: I did not reply to your last letter, as I expected to see you in Pittsburgh. I called at your office at about half past nine on Tuesday, the 19th, but you were not in. I went up the Monongahela that afternoon, but on my return I again tried to see you, and Gen. Sweitzer has probably already told you why I failed. You ask if there is any special form of transfer of rights over the Monongahela that I desire shall be used. I know of no special form, but I suppose that whatever document your attorney will prepare will be satisfactory. All I want is full right to build No. 8 whenever we may choose in the vicinity of Dunkard creek. I desire that your company will promise to raise the level of pool No. 7 to a height of 10 ft. above the present surface of pool No. 6. It is immaterial whether you lower No. 6 or not, provided you make the dead-low water of your new pool 10 ft. above the present low water of No. 6. If I am assured on that point I can locate No. 8 intelligently and so as to secure a 6-foot navigation over its lower water site. I find on further examination that the sites are less favorable than I had anticipated. I regret to state that work on the Monongahela has been stopped by high water and will not be resumed this season.

Respectfully, your obedient servant,
WM. E. MERRILL,
Maj. Engineer & B'v't Col."

U. S. ENGINEER OFFICE,
CUSTOM-HOUSE, CINCINNATI, O., *March* 24, 1881.

Hon. J. K. Moorhead, president Mon. Nav. Co., Pittsburgh, Pa.

SIR: The last river & harbor bill contains the following appropriation:

36 "Improving Monongahela river, West Virginia and Pennsylvania, $25,000; but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken, in good faith, the building of lock and dam number seven, at Jacob's creek, and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

You will therefore see that my work on number eight is wholly dependent on your work on number seven.

I have, therefore, to urge on your company that you will, at the earliest date possible, "undertake in good faith the building of lock and dam number seven," and that you will give the Secretary of War satisfactory assurance of your ability and purpose to complete it.

I would therefore suggest that it might be useful for your secretary to communicate at once to the Secretary of War such facts as to the financial resources of the company and its intentions about number seven as will satisfy him on the points specially left to his discretion and unlock the appropriation so that it may be used this summer.

Respectfully, your obedient servant.

WM. E. MERRILL,
Maj. Eng'rs & Bvt. Col.

That on the 3d day of March, 1881, U. S. Statutes at Large, vol. 21, page 471, an act of Congress was passed and approved which was in the following words:

"Improving Monongahela river, West Virginia and Pennsylvania, $25,000; but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven, at Jacob's creek, and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

That after the foregoing correspondence the Monongahela Navigation Company took action, as shown by the minute of the proceedings of their board of date April 6, 1881, as follows:

"The president also referred to letter received from Col. Merrill, and after the reading of the letter the following resolutions
37 were offered:

"Whereas Congress has made an appropriation for the commencement of the building of lock and dam number eight, in the Monongahela river, the payment of which appropriation is made to depend upon the Secretary of War being satisfied of the *bona fide* intention of this company to construct lock and dam number seven and of their financial ability to complete the same; and

"Whereas Col. Merrill, of the U. S. engine-rrs, in charge of the Government improvement of the Monongahela river, has requested this company to furnish the Secretary of War with satisfactory assurances in relation thereto: Therefore

"Resolved, That it is the *bona fide* purpose and intention of this company to construct lock and dam number seven in the Monongahela river in the manner and at the time required of them by the acts of assembly of the State of Pennsylvania—that is to say, so to complete said lock and dam number seven that the same shall be ready for use as soon as the requisite locks and dams above lock and dam number seven constructed or about to be constructed by the Federal Government shall also be finished and ready for use,

so as to complete the slack water of said river from Pittsburgh, Pennsylvania, to Morgantown, Virginia.

"Resolved, That the secretary of this company be directed to forward a copy of the foregoing resolution, together with copies of the company's annual report showing the intention of the company and their ability to complete this work, to Col. Merrill and also to the Secretary of War."

That notice of this action of the company was given to the Secretary of War by the secretary of the company, and that subsequently the following letter was received from Col. Merrill:

U. S. ENGINEER OFFICE,
CUSTOM-HOUSE, CINCINNATI, O., *May* 4, 1881.

Gen. J. K. Moorhead, pres. Monongahela Navigation Co., Pittsburgh, Pa.

38 SIR: I have just received official notice from the Secretary of War, through the chief of engineers, that the resolution and documents relative to the construction of lock and dam No. 7, on the Monongahela river, forwarded to this office by your company in April last (duplicates sent to the honorable Secretary of War), have been considered as fully meeting the requirements of the proviso in the last appropriation for the improvement of the above-named river prohibiting the expenditure of the money appropriated "until the Monongahela Navigation Company shall undertaken in good faith the building of lock and dam number seven at Jacob's creek and until said company shall, in a manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

I have been officially directed to notify your company of this decision of the Secretary of War.

The only obstacle now remaining to prevent immediate work at the mouth of Dunkard is the necessity of waiting until the land is purchased and paid for. This matter is yet in the hands of the Attorney General, and I am compelled to await his action.

Respectfully, your obedient servant,

WM. E. MERRILL,
Major of Engineers.

That thereupon the construction of said lock and dam number seven was begun in 1882 and the same was completed in 1884.

Answer. The court finds the facts to be as set forth in the foregoing (5th) request.

Filed Dec'r 24, 1890.

H. D. GAMBLE, *Clerk.*

39 In the Circuit Court of the United States, Western District of Penna.

In Re Condemnation of "Lock and Dam No. 7."

Request for Findings of Law by Counsel of Monongahela Navigation Company, and Answer of the Court Thereto.

The court is respectfully requested to hold as matter of law—

1st. That the United States do not possess a legal title to the lands and water lying within the limit of a State, nor do they have a right to enter and take possession of a navigable stream within the limits of a State for every and all purposes; that the powers and rights of the United States over navigable rivers within the limits of a State are based on and limited by the duty to promote and aid navigation and commerce between the States; that accordingly it is not within the legitimate powers of Congress to authorize the condemnation and appropriation by the United States of a system of locks and dams erected by a corporation of a State in pursuance of power granted by said State where such system is efficacious in promoting navigation and where the object of the Federal legislation is not to remove or abate such locks and dams as obstacles to navigation, but to adopt and subject them to the jurisdiction of the United States as means and facilities of interstate commerce; that it is only when the action of the State or its grantees in erecting works in navigable streams is deemed to encroach upon the navigation of such streams as means of interstate and foreign commerce that Congress may interfere and control and supersede it.

Answer *per curiam.* This request is refused.

2d. That in estimating the damages to which the owners of a system of locks and dams built under authority of law for the promotion of navigation are legally entitled in case of condemnation in order to make such system free for the use of navigators, the earning power and value of the tolls which said owners are entitled to collect and do collect constitute a material element or item; that hence that provision of the act of Congress under which these proceedings are had, being act of 1889, Statutes at Large, vol. 25, page 411, which prescribes that "in estimating the sum to be paid
40 by the United States the franchise of the Monongahela Navigation Company to collect tolls shall not be considered or estimated," is void and of no effect, first, because such provision is an attempt by the legislative power to dictate to the court, in its exercise of a judicial function, what shall and what shall not be considered the items and elements of the damage to which the navigation company is entitled; and, secondly, because such provision of said act of Congress disregards and is in deroga-ion of the Constitution of the United States, wherein it provides that private property shall not be taken for public use without just compensation.

Answer *per curiam.* This request is refused.

3d. That the said act of Congress under which these proceedings are had is unconstitutional and void.

Answer *per curiam*. This request is refused.

Filed Dec'r 24, 1890.

H. D. GAMBLE, *Clerk*.

41 In the Matter of the Condemnation of Lock and Dam Number Seven of the Monongahela Navigation Company.

The Finding of the Court as to Compensation.

In pursuance of written stipulation this case was tried by the court without the intervention of a jury, and therefore now, this 24th day of December, 1890, on due consideration, the court finds the value of said lock and dam number seven, otherwise known as "the upper lock and dam," and its appurtenances, of the Monongahela Navigation Company to be two hundred and nine thousand dollars ($209,000.00), not considering or estimating in this valuation the franchise of the said company to collect tolls; which sum of two hundred and nine thousand dollars ($209,000.00) the court fixes and determines as the amount to be paid by the United States to the said Monongahela Navigation Company for the said lock and dam number seven and its appurtenances.

And let judgment be entered upon the foregoing finding at the end of four days unless in the meantime a motion for a new trial should be entered *sec. reg.*

BY THE COURT.

Filed Dec'r 24, 1890.

H. D. GAMBLE, *Clerk*.

42 In the Circuit Court of the United States for the Western District of Pennsylvania.

In Re Proceedings of the United States to Condemn and Appropriate to Public Use Dam and Lock No. 7 of the Monongahela Navigation Co.

In pursuance of a written stipulation of the parties, the cause having been submitted to the court for trial without the intervention of a jury, the Monongahela Navigation Company, by its counsel, offered in evidence the acts of the General Assembly of the Commonwealth of Pennsylvania incorporating the Monongahela Navigation Company and defining its duties and powers, as follows:

"An act to repeal the State tax on real and personal property, and to continue and extend the improvements of the State by railroads and canals, and to charter a State bank to be called the United States bank.

"Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by authority of the same—

* * * * * * *

SEC. VI. And the said corporation shall further be bound to subscribe the following sums to the capital stock of the following-named companies, if requested to do so by the directors of said companies or either of them, within one year from the passage of this act, namely:

* * * * * * *

To the Monongahela Navigation Company fifty thousand dollars, if the same be incorporated at the opening of the books of subscription for the capital stock thereof, and the further sum of fifty thousand dollars as soon as one hundred thousand dollars subscribed by other persons or bodies corporate shall have been *bona fide* expended on the construction of said works."

(Approved February 18, 1836. P. L., 48. The United States bank.)

43 "An act to authorize the governor to incorporate a company to make a lock navigation on the River Monongahela.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by authority of the same, That Thomas H. Baird, Aaron Kerr, Ephraim L. Blain, William Bryant, Shasbazzer Bentley, Andrew Cregg, John Bowers, William Vankirk, Samuel Beatty, William Hopkins and James Gordon, of Washington county; George Dawson, Benedict Kimber, George Hogg, James L. Bowman, Israel Miller, David Gilmore, E. R. Oliphant, Jeremiah Davison, Thos. Wilson, Tazwell P. Martin, Geo. Cramer, Yates S. Conwell, Thos. Beatty, Aaron Bucher, John Harshe, Andrew Stewart, Samuel Evans, Isaac Crow, George Vance, James C. Etington, Robert Brown, James C. Ramsey, David B. Rhoades, William Everhart, Westley Frast, and Samuel J. Krepps, of Fayette county; Isaac Hill, Alexander Davidson, Thomas Hughes, Lawrence L. Minor, Robt. Maple, Daniel Boughner, Thomas Horner, Sen. Benjamin F. Black, Joseph Bailey, Ralph Drake, Samuel McGuire, Aaron Gregg, Joseph Reinhart, John Lindsay, William Litzamberg, Jonathen Gerard, and James Maple, of Greene county; Joseph Taylor, Thomas Raynolds, James McClure, Gilbert Stevens, Samuel Church, James W. Burbridge, Fauntly Muse, Samuel Walker, Christopher Magee, Neville D. Craig, James Ross, Jr., Samuel Stackhouse, Thomas Bakewell, James Anderson, John Irwin, Charles S. Bradford, William A. Penniman, Henry Smyser, William Larimer, Valentine Fehle, George Bell, Robert H. Peebles, Thomas M. Giffen, are hereby appointed commissioners to do and perform the several things hereinafter mentioned, that is to say, they or any five of them shall, on or before the first Monday of May next, procure a sufficient number of books, one or more of which shall be opened at convenient places in the city of Pittsburgh, at Elizabethtown and McKeesport in Allegheny county, at Williamsport and Fredericktown in the county of Washington, at Cookstown, Brownsville and Geneva in the county of Fayette and at Greensboro' and Jefferson in the county of Greene, and in each of them enter as follows:

"We, whose names are hereunto subscribed, do promise to pay to the president and managers of the Monongahela Navigation Company the sum of fifty dollars for every share of stock set opposite to our names respectively, in such manner and in such proportions and at such times as shall be determined by the president and managers of said company in pursuance of an act of the General Assembly of this Commonwealth, entitled 'An act to authorize the governor to incorporate a company to make a lock navigation on the river Monongahela.'

Witness our hands this — day ——, in the year of our Lord, 18—;" and shall thereupon give notice in one or more newspapers printed in the county of Fayette, and in one or more newspapers printed in the borough of Washington, one or more newspapers printed in Greene county, and one or more newspapers printed in the city of Pittsburgh, for one calendar month at least, of the times and places when and where the said books shall be kept open to receive subscriptions for the stock of the said company, at which times and places at least two of the commissioners shall attend, and permit all persons of lawful age, who shall offer to subscribe in the said books in their own name, or in the name of any other person who shall authorize the same to subscribe for any number of shares in the said stock, and the said books shall be kept open respectfully for the purpose aforesaid, at least six hours in every juridical day for the space of ten days, at the following-named places, to wit. The city of Pittsburgh, Elizabethtown in the county of Allegheny, at Williamsport in the county of Washington, at Brownsville, Cookstown, and Geneva in the county of Fayette, and at Greensboro' and Jefferson in the county of Greene; and if at the expiration of ten days it shall be ascertained that there is not six thousand shares subscribed in the books aforesaid, the said commissioners may adjourn from time to time and transfer the books elsewhere until the whole number of six thousand shares aforesaid shall have been subscribed; of which adjournment and transfer of the books the commissioners aforesaid shall give public notice, as the occasion may require and when the whole number of shares shall be subscribed then the books shall be closed: Provided always, that every person offering to subscribe in the said books, in his own or any other name, shall previously pay to the attending commissioners the sum of five dollars for every share subscribed, out of which shall be defrayed the expenses attending the taking of such subscriptions and other incidental expenses, and the remainder shall be paid to the treasurer of the corporation, as soon as the same shall be organized and the officers chosen, as hereinafter mentioned.

SEC. 2. That when two thousand shares or more of the said capital stock shall be subscribed, the commissioners, or a majority of them, shall certify to the governor, under their hands and seals, the names of the subscribers and the number of shares subscribed by each, whereupon the governor shall, by letters patent, under his hand and seal of the Commonwealth, create and erect the subscribers, and if the subscription be not full at the time, then all those who shall thereafter subscribe to the number of shares, as

aforesaid, into one body politic and corporate, in deed and in law, by the name, style and title of "the *the* president, managers, and company of the Monongahela Navigation Company" and by the same name the subscribers shall have perpetual succession, and all the privileges and franchises incident to a corporation, and shall be capable of taking and holding their capital stock, and the increase and profits thereof, and of enlarging the same from time to time by new subscriptions, in such manner and form as they shall think proper, if such enlargement shall be found necessary to fulfil the intention of this act, of purchasing, taking, and holding, to them, their successors, and assigns, in fee simple, or for any less estate, all such lands, tenements, hereditaments and estate, real and personal, as shall be necessary to them in the prosecution of their work; of suing and being sued, and of doing all and every other matter and thing which a corporation or body politic may lawfully do.

SEC. 3. Samuel Walker, George Dawson, George Hogg, James L. Bowman, Isreal Miller, Aaron Kerr, Neville B. Craig, Samuel Stackhouse, James Ross, Jr., and William W. Irwin, or a majority of them, shall, as soon as conveniently may be after the said letters patent shall be obtained, give at least twenty days' notice, in all the public newspapers hereinbefore mentioned, of the time and place by them appointed for the subscribers to meet, in order to organize the said company, who shall choose, by a majority of votes by ballot, to be given in person or proxy duly authorized, one president
46 and ten managers, a treasurer, secretary, and such other officers as shall be deemed necessary, which proxy shall have been obtained and bear date within three months previously to the election at which such proxy shall be presented; and the president and managers chosen as aforesaid shall conduct the business of said company until the first Monday in January next, and until like officers shall be chosen, and may make such by-laws, rules, orders, and regulations as do not contravene the Constitution and laws of the United States or of this State, that may be necessary for the well governing the affairs of the company; and the said company may demand and take such securities from their officers and agents, and in such sums as may be fixed by the by-laws or by resolution of the board, for the faithful charge of their respective duties.

SEC. 4. The stockholders shall meet on the first Monday of January in every year, at such place as may be fixed upon by the by-laws, of which notice shall be given, at least twenty days by the secretary in the newspapers before mentioned, and choose, by a majority of the votes present, such officers (for the ensuing year) as mentioned in the third section of this act, who shall continue in office one year and until others are chosen, and at such other times as they may be summoned by the managers, in such manner and form as shall be prescribed by the by-laws, at which annual and special meeting they shall have full power and authority to make, alter, or repeal such by-laws, by majority of votes, in manner aforesaid, and to do and perform any other corporate acts; and every person holding ten or any less number of shares of said stock shall be entitled to one vote for every share so held at any election of

officers for said company or other meeting of stockholders, and one vote for every additional ten shares: Provided that no number of shares shall entitle the holder thereof to more than ten votes: And provided, that the omission of the stockholders to meet and elect as aforesaid shall work no forfeiture, but they may be afterwards called together for that purpose by the managers.

SEC. 5. The said president and managers shall meet at such times and places as shall be found most convenient for the transacting of their business, and when met, five shall be a quorum, who in
47 the absence of the president may choose a chairman, and shall keep minutes of their transactions to be fairly entered in a book, and a quorum being formed, they shall have full power and authority to appoint all such surveyors, engineers, superintendents, and other artists and officers, as they shall deem necessary to carry on the intended work, to fix their salaries and wages, to ascertain the times, manner, and proportions in which the said stockholders shall pay the money due on their respective shares, to draw orders on the treasurer: Provided, that such drafts or orders be signed by the president, or in his absence by a majority of the quorum present, and generally to do all such other acts, matters, and things as by this act, and the by-laws and regulations of the company, they shall be authorized to do.

SEC. 6. The president and managers first chosen shall procure certificates of evidence of stock for all the shares of the said company respectively, and shall deliver one such certificate, signed by the president and counter-signed by the treasurer and sealed with the common seal of the corporation, to each person for every share by him, her or them subscribed and held, he, she, or they paying five dollars for each share, as aforesaid, which certificates or evidence of stock shall be transferable at pleasure in person or by attorney, duly authorized, in the presence of the president or treasurer, to be entered in a book to be kept for that purpose, subject, however, to all payment due or to become due thereon; and the assignee holding any certificate entered as aforesaid shall be a member of the said corporation, and entitled to one share of the capital stock and of all the estates and emoluments of the company incident to one share, and to vote as aforesaid at the meetings thereof, and be subject to all the penalties and forfeitures, and of being sued for all the balance and penalty due or to become due on each share, as the original subscribers would have been.

SEC. 7. After thirty days notice in the public papers aforesaid of the time and place appointed for the payment of any proportion or instalment of the said capital stock, in order to carry on the work any stockholders having neglected or refused to pay such proportion or instalment at the place appointed for the space of thirty days after the time so appointed, every such stockholder, or his assignee, shall, in addition to such instalment so called for, pay
48 at the rate of two per centum a month for the delay of such payment, and if the same and additional penalties shall remain unpaid for such space of time as the accumulated penalty shall become equal to the sums before; paid in part and in account

of such shares, the same shall be forfeited to the said company, and may be sold to any person or persons willing to purchase, for such price as can be obtained for the same; or in default of payment by any stockholders of any instalment as aforesaid, the said president and managers may, at their election, cause suit to be brought, before a justice of the peace, or in any court having competent jurisdiction, for the recovery of the same, together with the penalties aforesaid: Provided, that no stockholders, whether original subscriber or assignee, shall be entitled to a vote at any election, or at any general or special meeting of said company, on whose share or shares any instalment or arrearages may be due and payable more than thirty days previously to said election or meeting.

SEC. 8. It shall and may be lawful for the said president, managers and company, their superintendents, surveyors, engineers, artists and workmen, to enter upon the said river Monongahela, and upon the lands on either side, and to use the rocks, stones, gravel, or earth which may be found thereon in the construction of their works, first giving notice to the owner or occupiers of the land, and to form and make, erect and set up any dams, locks, or any other device whatsoever, which they shall think most fit and convenient to make a complete slack-water navigation between the points herein mentioned, to wit: the city of Pittsburgh and the Virginia State line; and that the dams which they shall so construct for the purpose of slack-water navigation shall not exceed in height four feet six inches, and that locks for the purposes of passing streamboats, barges, and other crafts, up as well as down said river, shall be of sufficient width and length to admit a safe and easy passage for steamboats, barges, and other crafts, up as well as down said river; they shall make amends for any damage that may be done on said lands, and pay the owner or owners for the materials taken away, as well as for the land occupied in the construction of the said dams and water works: Provided, if the parties cannot agree, the said damages are to be valued by five disinterested freeholders, appointed by consent of the parties, or if they cannot
49 agree, by any disinterested justice of the peace of the proper county, and the report made by the freeholders so agreed upon, or appointed as aforesaid, or a majority thereof, shall be filed in the office of the prothonotary of the country in which the land lies, and shall be regularly entered of record, which report being confirmed by the court, judgment shall be entered thereon, and execution may issue in case of non-payment for the sum awarded, with reasonable costs to be assessed by the court; and it shall be the duty of the five freeholders aforesaid, in assessing the damages, to take into consideration the advantages derived to the owner or owners of the premises from the said improvements hereby authorized: Provided, that either party may appeal to the court within thirty days after such report may have been failed in the prothonotary's office of the proper county, in the same manner as appeals are allowed in cases under the act entitled "An act regulating arbitrations," passed the twentieth day of March anno Domini eighteen hundred and ten: Provided further, that before

entering upon or occupying any lands, said company shall give security, to be approved by the court of common pleas of the country in which the land lies, to pay the amount of damages, which shall be finally adjudged against them for such occupation or entry upon such land.

SEC. 9. The said president, managers, and company shall have the privilege, and be entitled to use the water power from the said river, to propel such machinery as they may think proper to erect on the land which they may previously have purchased from the owner or owners, or may sell in fee, lease or rent, for one or more years the said water, power, to any person or persons on such terms as shall be most advantageous to the corporation: Provided, it may be so done that it shall not injure impede, or interrupt the navigation, and that the moneys arising from such sale of the water power be applied to the use and benefit of said corporation.

SEC. 10. So soon as twenty miles of the slack-water navigation shall be completed, the said president and managers shall give notice thereof to the governor, who shall thereupon nominate and appoint three disinterested persons to view and examine the same, and report to him in writing, under oath or affimation, whether the said works have been so far executed in a workmanlike manner, according to the true intent and meaning of this act; and if at any time their report shall be in the affirmative, then the governor shall, by license, under his hand and the seal of this Commonwealth, permit the said president, managers, and company, or such person as they shall from time to time appoint, to collect the tolls; which shall not exceed the following rates, to wit: That the president and managers shall be entitled to take and receive the same rate of toll per ton, or otherwise, at their discretion, as the Schuylkill Navigation Company are entitled to receive under their act of incorporation: Provided further, that if at the expiration of two years after the said work shall have been completed, the tolls, together with the interest of the surplus of any money arising from the sales of water power, or the rents and profits thereof, should enable the company, after paying all repairs and other necessary expenses, to divide more than seven per centum per annum on the capital stock expended, the tolls shall be so reduced that the dividends shall not exceed seven per cent., and shall so continue for five years, and if at the expiration of that time they shall exceed nine per cent., they shall be so reduced as not to exceed nine per cent. and shall thereafter be so regulated, from time to time so as not to exceed nine per cent. per annum; and if at any time after the expiration of one year from the completion of said work, the net profits aforesaid shall not amount to seven per cent. upon the money expended, it shall be lawful to increase the said tolls so as to divide seven per cnet.: Provided also, that if it should be found at any time after said company goes into operation, that the profits arising from the sale, rent, or lease of the said water power should amount to seven per centum per annum on the capital stock actually expended, then it shall not be lawful to demand or receive any toll at any of the locks aforesaid, but to permit all persons going up or down said

river in boats, barges, or other vessels, to pass through said locks free of any toll or other charges whatsoever.

SEC. 11. It shall be the duty of the commandant of any boat, barge, or other vessel navigating the said river, when he shall arrive within one-fourth of a mile from any lock so erected under
51 the penalty of two dollars, to blow a horn or trumpet or ring a bell, whereupon the keeper of such lock shall attend for the purpose of opening such gate or sluice to let said boat, barge, or other vessel pass without unnecessary delay, and in safety; and if any boat, barge, or other craft, shall be prevented from passing up or down any of the said locks or sluices by reason of the lock not being raised for more than thirty minutes, the president, managers, and company shall, upon conviction thereof, forfeit and pay to the persons so hindered the sum of one dollar for every thirty minutes beyond the said time that he shall be so prevented, and in the same proportion for any longer or shorter time, and civil process in the proper county, and next to the place where the offence shall have been committed, shall be served by the owner or owners thus aggrieved upon the aforesaid president, managers and company.

SEC. 12. If the president, managers, and company shall neglect or refuse to keep in good order and repair any dam, lock, or sluice of their own construction, or shall neglect to remove any obstacle which may occur therein, so that boats, barges, rafts or vessels cannot at all times safely navigate said river when the same is not prevented by ice or other unavoidable cause, they shall for every such offence pay the sum of fifty dollars, to be recovered in the same manner as debts of equal amount are, or shall be by law recoverable, one-half for the use of the informer and the other half to the use of the poor of the township or county where the neglect or refusal may occur.

SEC. 13. If any person or persons shall wilfully and knowingly do any act or thing whereby the navigation shall be impeded, or any dam, lock, gate, or engine, machine, or device therein belonging or any machinery or property of the company shall be injured or damaged, he, she, or they so offending shall forfeit and pay to the said company double the damages by them sustained, together with costs, to be recovered by action of debt before any justice of the peace, or in any court of competent jurisdiction.

SEC. 14. The president and managers of the said company shall keep fair and just accounts of all moneys received by them from the said commissioners, and from the subscribers to the
52 undertaking, on account of the several subscriptions, of all penalties for delay in the payment thereof, and the amount of profits on the shares which may be forfeited as aforesaid, and also all of the moneys by them expended in the prosecution of said works, and shall in every year submit such accounts to the stockholders, at their annual meetings, and when the aggregate amount of such receipts and expenditures shall be ascertained, and upon such liquidation, or when the capital stock shall be nearly expended, it shall be found that the said capital stock will be insufficient to complete the said navigation, according to the true intent and meaning of

this act, it shall and may be lawful for the said president, managers and company, at a stated special meeting, to be convened for the purpose, to increase the number of shares to such extent as shall be deemed sufficient to accomplish the work, and to receive and demand the moneys for shares so subscribed, in like manner and under like penalties as are hereinbefore provided, or shall be provided by their by-laws.

SEC. 15. The president, managers, and company shall keep a just and true account of all the money received by their several and respective collectors of tolls, at the several and respective locks, and all moneys received for the rent or hire of the water, power, and all other emoluments, and shall make and declare a dividend of the clear profits and income thereof, among all the stockholders in proportion to the stock held by each, all contingent costs and charges being first deducted, and shall, on the first Monday of January in each and every year, publish the dividend made of their clear profits, and the time when and the place where the same shall be paid to the stockholders, not exceeding twenty days thereafter and shall cause the same to be paid accordingly, and shall, on or before the first Monday of February, in every year after the incorporation of the company, lay an abstract of the accounts of their receipts and disbursements before the legislature, under oath or affirmation of the president of the company; and the said company shall pay annually into the treasury of the Commonwealth a tax of eight per centum per annum on all dividends which may exceed six per centum on the capital stock actually paid in.

53 SEC. 16. Nothing herein contained shall at any time injure, destroy, or in any way impair any right, privilege or legal claim which may have been granted to individuals by any act or acts of assembly hereinbefore passed for the purpose of erecting mill-dams on said river, but such persons as have mill-dams thereon are hereby enjoined to have them constructed or raised to the same height as is prescribed in the eighth section of this act, at their own proper cost and expense, and also to build and erect a suitable lock or locks, and guard-wall, and the same to be inspected and approved of by the said president and managers, or a majority of them, and to maintain and keep the same in perfect order and repair, to receive the tolls, and be subject to the same penalties and forfeitures, and be liable to have process served on him, her, or them, in the same manner as the president, managers, and company are subject to according to the provisions of this act; but if the owner of such privilege shall, for six weeks after notice given by said president, managers, and company, neglect or refuse to construct or repair his or her dam, and make his or her lock in the manner prescribed by the company, then the said managers and company shall have power to erect such dam and lock, and receive the tolls in the same manner as is provided in the tenth section of this act.

SEC. 17. If the said president, managers, and company shall not proceed to carry on the said work, within five years from the passage of this act, and shall not complete the navigation to the Virginia State line aforesaid in seven years thereafter, according to the

true intent and meaning hereof, then, and in either of those cases, all the rights, privileges, liberties, and franchises hereby granted to said company shall revert to the Commonwealth: And provided, That in case of forfeiture by the company the owner or owners of any water power created by any dam erected by virtue of this act shall be obliged to keep in perfect repair and good condition any dam or dams, lock or locks, connected with such water power, under and subject to the same penalties as the company originally were, and shall have the right to charge and receive the same tolls as the said company had received; and in case the owner or owners
54 of said water power shall neglect or refuse to keep the said dam or dams, lock or locks, as aforesaid, in good order and repair, fit for the passage of boats, barges, and other vessels, as the case may be, the legislature may resume all and singular the rights, privileges, liberties, and franchise-, granted by this act.

SEC. 18. It shall be lawful for the Commonwealth, at the end of twenty-five years from the completion of the work hereby authorized, to purchase the improvements made in pursuance of this act, by paying to the company the original cost expended in the improvements and the subsequent expenses, together with six per cent. interest thereon, deducting from the sum of principal and interest aforesaid the dividend before declared by the said company on the capital stock, and on the payment thereof by the Commonwealth to the said company, in such manner and form as shall be agreed upon by the said company and by agents duly authorized by the Commonwealth, all and singular the improvements aforesaid, with its appurtenances, water rights, and privileges shall be vested in the Commonwealth, and the privileges and corporate rights hereby granted will thereupon cease and determine, excepting so far as the same may be necessary in the settlement of the concerns of said company.

SEC. 19. No suit or actions shall be brought or prosecuted by any person or persons for penalties incurred under this act, unless said suit or action shall be commenced within six months next after the offence shall have been committed or the cause of action have accrued, and the defendant or defendants in such suit or action may plead the general issue and give this act and special matter in evidence, and that the same was done in pursuance and by authority of this act.

SEC. 20. The said company shall not engage, directly or indirectly, in any banking, monied, commercial, or manufacturing concern, or in the transportation or storage of any merchandise, lumber, coal, grain, flour, or other articles; nor shall they hold, erect, or o-n any other lands, buildings, wharves, or docks than such as are necessary and convenient for their business as a navigation company.

SEC. 21. That the said company hereby incorporated be,
55 and they are hereby, authorized and empowered to procure the right from the proper authorities of the State of Virginia to extend the said improvements from the Pennsylvania State line as far up as the said company may deem practicable: Provided,

That the charter or grant which shall be obtained from the said State of Virginia, for the purpose aforesaid shall stipulate that no higher or other tolls or charges shall be made or exacted or so much of the said improvements as shall be located within the said State than are permitted to be charged by the provisions of this act on that portion of said improvements which shall be located in the State of Pennsylvania, and in default of such stipulation within three years from the passage of this act the legislature of this Commonwealth reserves the right to make such alterations and additions to the charter hereby authorized as may be deemed just and expedient.

(Approved March 31, 1836. Pamphlet Laws, page 262.)

Resolution relating to the procuring and opening of books for receiving subscriptions to the stock of the company for making lock navigation on the Monongahela river.

Whereas in and by an act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An act to authorize the governor to incorporate a company to make a (lock) navigation on the River Monongahela," approved the thirty-first day of March, eighteen hundred and thirty-six, it is made the duty of the commissioner therein named to procure and prepare books for receiving subscriptions of stock of said company on or before the first Monday of May, eighteen hundred and thirty-six.

And whereas the period of time between the passage of said act and the said first Monday of May was not sufficient to enable the said commissioner to perform the duty so enjoined upon them: therefore,

Resolved by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, that the said commissioners be, and they are hereby, authorized to receive subscriptions to the stock of said company, in books which
56 may have been opened at any time, in conformity with the directions contained in said act; and all such subscriptions of stock shall be valid in all respects as if the said books had been procured and prepared on or before the said first Monday in May.

(Approved June 14, 1836. Pamphlet Laws, page 848.)

An act to provide for repairs and to continue the improvements of the State, and other purposes.

Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that the following sums are hereby specifically appropriated for the purposes hereinafter mentioned, to wit, to the stock of the Monongahela Navigation Company, twenty-five thousand dollars.

(Approved April 14, 1838. Pamphlet Laws, page 442.)

A supplement to an act entitled "An act to erect Shirleysburg, in the county of Huntingdon; New Hope, in the county of Bucks, and Hamburg, in the county of Berks, into boroughs, and for other purposes."

* * * * * * *

SEC. 51. That Henry Shacpneck, of the county of Greene, be and he is hereby authorized to erect a mill-dam in the Monongahela river, at his mill in Cumberland township, in said county, of the same height, and in the same manner, and under the same terms as is required by the sixteenth section of the act of the thirty-first day — March, eighteen hundred and thirty-six, entitled "An act to authorize the governor to incorporate a company to make a lock navigation on the river Monongahela."

(Approved April 16, 1838. Pamphlet Laws, page 579.)

A supplement to an act entitled "An act to authorize the
57 governor to incorporate the company to make a lock navigation on the River Monongahela."

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that any defect or irregularity in the proceedings of the commissioners appointed by the act entitled "An act to authorize the governor to incorporate a company to make a lock navigation on the River Monongahela," passed the thirty-first day of March, eighteen hundred and thirty-six, in taking subscriptions to and organizing the said company, and any defect or irregularity in the proceedings of the board of managers of said company in organizing and conducting the affairs of the same, so far as the said defect or irregularity may have proceeded from the neglect or omission of the said comsioners and board of managers fully to comply with the requisitions of the proviso to the first section of said act, shall be and the same are hereby remedied and supplied; and the acts and proceedings of the said commissioners and board of managers which were in contravention of the said proviso shall be and are hereby declared valid and legal, as if the same had been fully complied with.

SEC. 2. The name, style, and title of the said company shall, from and after the passage of this act, be the "Monongahela Navigation Company."

SEC. 3. At all elections held by the stockholders every person holding ten or any less number of shares shall be entitled to one vote for every share so held and one vote for every additional ten shares: Provided, That no number of shares shall entitled the holder thereof to more than twenty votes. And so much of the proviso in the fourth section of the aforesaid act as conflicts with this section shall be, and is hereby, repealed.

SEC. 4. The said company shall be permitted to erect such dams as may be necessary for the construction of the said navigation below Brownsville to a height not exceeding eight feet from pool to pool. In selecting to assess damages occasioned by the construction

of said navigation, no person shall be chosen who is a resident of any county through which the said improvement shall pass:
58 Provided, That all the locks below the town of Elizabeth, in Allegheny county, on said river, be made one hundred and ninety feet long and fifty feet wide, and that all the locks below the town of Brownsville shall be of like dimensions.

SEC. 5. When the said navigation, or any portion thereof, shall be completed, the president and managers shall be entitled to receive such rates of toll per mile, at their discretion, as may be just and reasonable, subject, however, to the control and regulation of the legislature if at any time complaint should be made to the same: Provided always, That the net dividends on said stock shall not exceed twelve per cent. per annum, and the said company shall not be compelled to permit any boat or craft, except such as shall be hereinafter provided for, to pass toll free unless the dividends amount to twelve per cent. per annum.

SEC. 6. The penalty inflicted on said company by the eleventh section of said act for detention in passing the locks or sluices shall not be imposed unless occasioned by malice or culpaple negligence on the part of the said company, its officers or agents.

SEC. 7. The said company shall be permitted to set apart, as a contingent fund for the purpose of defraying the expenses of extraordinary repairs, or other unforeseen expenditures to which said company may become liable, the sum of twenty per cent. of their tolls, interest, rents, and profits, annually, until the said contingent fund shall amount to fifty thousand dollars, but in the annual abstract of its accounts laid before the legislature the amount of such contingent fund shall be fully set forth.

SEC. 8. In case the Commonwealth should at any time purchase the improvement, made in pursuance of this act and the act to which this is a supplement, then the Commonwealth shall pay the company such sum or sums of money, as, together with the next dividends, shall amount to the expense incurred in constructing said improvements and keeping it in repair, with eight per cent. per annum interest thereon.

SEC. 9. The limitation of six months for the commencement of action, as prescribed in the nineteenth section of the original act, is hereby extended to one year.
59 SEC. 10. The Monongahela Navigation Company shall have the privilege to purchase and hold such lands as may be necessary to the full use and enjoyment of the water right secured to them by the original act.

SEC. 11. The time for obtaining a charter or grant in the State of Virginia, in relation to this improvement, is hereby extended to the thirty-first day of March, eighteen hundred and forty-two.

SEC. 12. The sixteenth section, together with such other portions of the act to which this is a supplement, as are hereby altered and supplied, shall be and are from henceforth repealed.

SEC. 13. The legislature reserves the right to alter, amend, or

annul the charter of said company, at any time hereafter, in such manner, however, that no injustice shall be done to the corporators.
(Approved June 24, 1839. Pamphlet Laws, page 454.)

An act to provide for continuing the improvements of the State and for payment of the interest on the public debt.

Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same:

* * * * * * *

SEC. 5. The governor is hereby authorized and required, within thirty days after the passage of this act, to subscribe to the stock of the Monongahela Navigation Company the sum of one hundred thousand dollars, which shall constitute the Commonwealth a stockholder in said company to that amount: Provided, that all descending crafts owned by citizens of Pennsylvania, not calculated or intended to return from any point between Millsborough and the Virginia State line, shall pass free of toll through any lock or dam of the lower division of said improvement, until the company shall put the first dam above Brownsville in the second division under contract, and complete the same agreeably to the plan of said improvement.
(Approved June 11, 1840. Pamphlet Laws, page 647.)

60 An act to provide revenue to meet the demand on the treasurer, and for other purposes.

Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same:

* * * * * * *

SEC. 14. That the amount of the loan of three million one hundred thousand dollars, authorized by the first section of this act, when received, shall be specifically appropriated as follows: * * * To the Monongahela Navigation Company, seventy thousand dollars, being the unpaid balance of the last year's appropriation.
(Passed May 4, 1841. Pamphlet Laws, page 312.)

Resolution relative to the Monongahela Navigation Company.

Resolved by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That in case of a vacancy occurring in the office of president of the Monongahela Navigation Company, either by death, resignation, or otherwise, the board of managers shall have power to fill the vacancy by the election of any person who may be a stockholder in said company, and the person so elected shall hold and exercise all the powers, and receive all the emoluments appertaining to the office of president, until the next annual election of officers for said company. And it

shall be lawful for the president and managers of the Monongahela Navigation Company to raise by way of loan, at a rate of interest not exceeding six per cent from any individual, bodies politic or corporate, on such terms and conditions as they may think fit, such sums of money as they may from time to time find expedient for the completion of said improvement upon the credit of the capital stock and incorporation, including the net proceeds of the tolls and profits of the same, and for the fulfillment of the terms and
61 conditions of any such loan, to mortgage any part or the whole of their property, tolls, profits, or estates whatever, which mortgage or mortgages shall be transferable at any time hereafter on the books of the company: Provided, that the contract for said loan or loans shall be approved by the governor.

Approved May 4, 1841. (Pamphlet Laws, page 444.)

An act to authorize the construction of a toll-bridge over the river Schuylkill, at or near Windsor Haven, in Berks county, and for other purposes.

Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same:

* * * * * * *

SEC. 5. That it shall be lawful for the board of managers of the Monongahela Navigation Company, in addition to the amount they now owe, to borrow from time to time any sum or sums of money, not in the whole exceeding two hundred thousand dollars, to enable them to complete and repair their works and to carry on their business, and to secure the payment of the certificates to be given therefor, which certificates shall be in sums not less than one hundred dollars, and all other claims against the said company, to execute a mortgage or mortgages on their navigation and all other property, and on the tolls, rents, issues, and profits accruing therefrom, or any portion or portions thereof, and that in case of a sale under the said mortgage the purchasers shall have and enjoy the same corporate privileges and the same rights in the mortgaged portion or portions of the said navigation, and in the collection of tolls, as the said Monongahela Navigation Company now have, and shall be authorized to organize and continue the corporation by the division of their capital into shares, and by the election of managers and officers in like manner; and if the mortgage or mortgages shall so stipulate, the said Monongahela Navigation Company may continue in possession and management of the mortgaged property, as well
62 personal as real, without prejudice to the security of the mortgage thereon: Provided, that no dividend of profits shall be made to the stockholders of the Monongahela Navigation Company while any loan which may have fallen due shall after demand remain unpaid: And provided also, that all profits arising from the business of the said company, after defraying the expenses thereof and of the completion and repairs of their works, shall be applied in the first place to the payment of the interest on all loans

of the company, and then to the payment of the principal of all loans and other debts which for the time being shall be due and unpaid.

SEC. 6. All mortgages executed and acknowledged under the provisions of this act shall be recorded in the recorder's office of the county of Fayette within thirty days after such acknowledg-ment, and such recording shall be as good and effectual in law to all intents and purposes as if the same had been recorded in all the countries in which the said mortgaged property may be situated or be, and all legal proceedings had upon said mortgage shall be instituted in the court of common pleas of Fayette county, whose judgement and final process shall be as effectual as if all property was situated in said county, and no proceeding shall be had on any such mortgage until the expiration of ten years from the date thereof, and in all cases of sale on any such mortgage the proceeds thereof shall be applied *pro rata* to the payment of all debts of said company of every description whatsoever.

(Approved April 5, 1842. Pamphlet Laws, page 232.)

An act concerning the trust estate of Hugh Roberts, deceased, and for other purposes.

Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same:

* * * * * * *

SEC. 57. That the imposition of tolls by the "Monongahela Navigation Company" upon the works of the said company shall be subject to the following regulations:

63 1st. That all coal-boats taking in their loading above lock and dam No. 3, on the Monongahela river, shall be permitted to pass through the locks on said river at a rate not exceeding one dollar per lock, for each boat in descending the same.

2nd. That all new boats built on the Monongahela river above the said lock and dam shall pay the same rate of tolls as the same description of boats that navigate the said river between Brownsville and Pittsburgh.

3rd. That so soon as lock and dam No. 3 shall be completed these regulations shall cease and have no effect as far up the said river as dam and lock No. 4 and when lock and dam No. 4 shall be completed, this act shall cease and determine.

SEC. 58. That if any lock-keeper or other officer on the works of the said company shall infringe any of the above regulations, or obstruct in any manner the passage of the boat subject to them, the said lock-keeper or other officer shall be subject to the same penalties contained in the eleventh section of the act to which this is a supplement.

(Approved July 16, 1842. Pamphlet Laws, page 389.)

An act to provide for the ordinary expenses of the government, payment of the interest upon the State debt, receiving of proposals for the sale of the public works and for other purposes.

Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same:

* * * * * * *

SEC. 4. That the governor is hereby authorized to sell transfer and convey, at public sale, at such place or places as he may deem proper, any of the bank, turnpike, bridge, canal, navigation, or railroad stock, in any incorporated company, held and owned by the Commonwealth of Pennsylvania, to the highest bidder or bidders, his, her, or their assigns, after having caused sixty days public notice to be given of the time and place of such sale, in Harrisburg, Philadelphia, Pittsburgh, and the county or counties in which the
64 improvements or banks are located of which the stock is offered for sale: Provided, that no share of stock shall be sold for less than an amount which, at the rate of five per cent., would produce an interest equal to the dividend received by the State on said stock for the year eighteen hundred and forty-one.

SEC. 5. That it shall be lawful for the State treasurer to receive in payment of any of the stocks, hereinbefore authorized to be sold, certificates of State stock, or the amount, or any part thereof, of any credit given to any person on the books of the auditor general, in pursuance of the provisions of the resolution of the seventh of April last; and that if no sale shall be effected of the said stock at the time the same may be publicly offered for sale, then any creditor of the State, holding certificates of stock, or having a credit as aforesaid, shall be allowed to exchange such stock or such credit at par, for any of the banks, bridge, canal, navigation, railroad, or turnpike stock owned by this Commonwealth at the rates stipulated in the proviso to the fourth section.

(Approved July 27, 1842. Pamphlet Laws, page 443.)

An act extending the time for the completion of the lock navigation on the river Monongahela, and for other purposes.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that the time fixed for the completion of the lock navigation on the Monongahela river by the seventeenth section of the act entitled "An act to authorize the governor to incorporate a company to make a lock navigation on the river Monongahela," passed on the thirty-first day of March, eighteen hundred and thirty-six, be, and the same is hereby, extended for another period of seven years from the passage of this act.

SEC. 2. The time for commencing the Hamburg, Allentown, Bethlehem and Easton railroad be, and the same — hereby, extended to

three years, and the time for completing the said road to
65 eight, from and after the passage of this act.
(Approved March 31, 1843. Pamphlet Laws, page 119.)

An act to provide for the payment of the domestic creditors of this Commonwealth, sale of State stocks, and for other purposes.

Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same:

* * * * * * *

SEC. 4. That Evans Rogers, of the city of Philadelphia, James Clark, of the county of Indiana, and the State treasurer be, and they are hereby, appointed commissioners to sell, transfer, and convey, at public or private sale, at such times and places and in such amounts as they may deem proper, any or all of the bank, turnpike, bridge, canal, railroad, or navigation stocks in any incorporated company held and owned by the Commonwealth of Pennsylvania, at such price or prices as they may deem the same worth, in such payment as is hereinafter directed; and it shall be the duty of the said commissioners to pay into the State treasurer all the money arising from said sales as soon after the receipt thereof as possible; and they shall deliver to the auditor general the certificates of indebtedness hereinafter authorized to be received in payment of said stocks, who shall note the payments of the same on his books: Provided, that it shall not be lawful for the said commissioners, or either of them, to become the purchasers of said stock, or any portion thereof, directly or indirectly: Provided, further, that the commission created by this act shall continue until first January next, and no longer.

SEC. 5. It shall be lawful for the State treasurer to receive, in payment for said stocks, certificates of credits, entered on the books of the auditor general, in pursuance of a resolution of the legislature passed the seventh day of April, eighteen hundred and forty-two, notes issued by the banks of this Commonwealth, in pursuance of the act of the fourth of May, 1841, or specie, or the notes
66 of specie-paying banks; and the purchaser or purchasers of said stock, after the same has been transferred, shall have the same right to vote at the election for officers, or on any other question, in any incorporated company in the same way as though they had originally been subscribers to said stock; and it shall be lawful for the managers or directors of an incorporated company, in which the State holds stocks, to purchase from the Commonwealth, through the aforesaid commissioners, the shares of stock owned by the Commonwealth in said companies respectively.

SEC. 6. Said commissioners shall commence and complete said sales as soon after the passage of this act as may appear consistent to the interest of the Commonwealth; they shall keep an accurate record of their proceedings, and shall communicate to the legislature, at its next session, a statement of the same, designating the stocks sold, the names of the purchasers, and the price received;

and the said commission-s shall be allowed and paid out of the State treasury, on the presentation of an account, properly authenticated, in full for their services, three dollars per day for every day actually employed in the service of the Commonwealth in pursuance of the provisions of this act, and ten cents per mile circular for traveling from place to place to effect said sales, except the State treasurer, who shall be entitled to mileage only: Provided, that before entering upon the aforesaid duties said commissioners shall severally take and subscribe, before some alderman or justice of the peace, an oath or affirmation to discharge the trust confided to them by this act with honesty and fidelity: Provided also, that in case a vacancy should occur in said board of commissioners, by death, resignation, or otherwise, it shall be the duty of the governor to supply such vacancy by appointment.

(Approved April 8, 1843. Pamphlet Laws, page 182.)

An act declaratory of the act passed the thirty-first day of March anno Domoni, eighteen hundred and thrty-six, entitled "An act to authorize the governor to incorporate a company to 67 make a lock navigation on the river Monongahela."

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the president, managers, and company of the Monongahela Navigation Company shall make amends for any damages done, or that may be done, to lands and property lying upon the Monongahela river or its branches and tributary streams by overflowing the same; and that the act passed the thirty-first day of March anno Domini eighteen hundred and thirty-six, authorizing the incorporation of the said company and the supplement thereto, passed 24th June, eighteen hundred and thirty-nine, shall not be construed so as to injure, destroy, or impair any right, privilege, or legal claim which may have been granted to others by act of assembly heretofore passed, authorizing the erection of dams on any of the branches or tributaries of said river; nor so as to permit said company to injure, destroy, or affect injuriously the usefulness of any mill-dam, mill, or other structure erected on or near said branches or tributaries, without compensation to the owners thereof, to be ascertained in the same manner as prescribed by the said act of the thirty-first day of March anno Domini, eighteen hundred and thirty-six.

(Approved April 25, 1844. Pamphlet Laws, page 390.)

A further supplement to "An act to authorize the governor to incorporate a company, to make a lock navigation on the river Monongahela."

SECTION 1. Be it enacted by the senate and house of representatives on the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That the eighth section of the act entitled "An act to authorize the governor

to incorporate a company to make a lock navigation on the river Monongahela," approved the thirty-first day of March, eighteen hundred and thirty-six, which authorizes the use and occupancy of ground and materials for the purpose of constructing said navigation, shall be so construed as to include sufficient ground at
68 each lock, for the purpose of erecting thereon a lock-house to be occupied by the lock-keeper and his hands: Provided, that no more than half an acre shall be taken at any lock for this purpose, the value of said grounds to be assessed as provided for in the aforesaid act and supplement thereto approved the 24th day of June, eighteen hundred and thirty-nine; and the said company is further required, in accordance with the direction of the fourth section of the seventh article of the constitution of Pennsylvania, to make compensation to the owners of said property, or give adequate security therefor, before such shall be taken under the provisions of this act.

(Approved January 31, 1845. Pamphlet Laws, page 13.)

An act relating to the navigation of the Youghiogheny river.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That from and after the passage of this act so much of the provisions of the fifth section of the act of eleventh June, eighteen hundred and forty, entitled "An act to provide for continuing the improvements of the State, and for the payment of the interests on the State debt," which provides that all descending crafts owned by citizens of Pennsylvania, and not intending to return, shall pass free from toll on the lower division of the Monongahela improvement, is hereby extended to the Youghiogheny river; and hereafter all boats, rafts, arks, and other crafts descending the Youghiogheny river, owned by citizens of Pennsylvania, and not calculated or intended to return, shall pass free of toll or other charge through any lock or locks, dam or dams, of the Monongahela Navigation Company.

(Approved April 15, 1845. Pamphlet Laws, page 447.)

An act relative to stocks in incorporated companies purchased of the Commonwealth, and for other purposes.

SECTION 1. Be it enacted by the senate and house of repre-
69 sentatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the auditor general be, and he is hereby, authorized and required to assign, transfer, and deliver to the purchaser or purchasers of stock owned by the Commonwealth in any company, sold under the provisions of the act of eighth of April, anno Domoni eighteen hundred and forty-three, entitled "An act for the payment of the domestic creditors of the Commonwealth, sale of State stock, and for other purposes," any certificate or certificates of stock held by the State in any such companies, which may be in his, or any

other public office in Harrisburg, agreeably to the provisions of any act incorporating any such company.

SEC. 2. That in all cases hereafter where the president and managers of any of the above companies shall neglect or refuse to give notice for holding the annual elections at the time now required by law, it shall be lawful for any five stockholders to give public notice in one or more newspapers, as soon as possible after the first failure, which notice shall not be less than twenty days previous to the election, and any election held in pursuance of said notice shall be as valid as if it had been called by the president and managers.

(Approved April 3, 1846. Pamphlet Laws, page 239.)

A further supplement to an act to authorize the governor to incorporate a company to construct a slack-water navigation in the Monongahela river.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by authority of the same, That it shall and may be lawful for the president and managers of the Monongahela Navigation Company, by any general regulation to be by them adopted for that purpose, to require the clerks, captain, or other chief officers of all steamboats or other crafts carrying passengers on board, and passing through any of the locks of the said company on the Monongahela river, make returns upon oath, to the collector or lock-keepers at the said lock or any of them, whenever, at such times, and in such manner as the same may be by the said president and managers directed to be done, of the whole number of passengers by them or by the boats whereon they are employed, respectively, carried through the said lock, or any other of them, and in the case of way passengers, of the number of locks by them respectively passed of, for, and during the whole period or periods to which the said returns shall be required to extend.

SEC. 2. That if any clerk, captain or other chief officer of any such steamboat or other craft as aforesaid shall at any time neglect or refuse to comply with the regulations of the said company, so established as aforesaid, he or they shall, for every such neglect or refusal, forfeit to the said company the sum of ten dollars, to be recovered by them as debts of the like amount are by law recoverable.

SEC. 3. That if any clerk, captain, or any other chief officer of any such steamboat or other craft as aforesaid shall swear falsely touching any matter set forth in the said returns by him or them so required to be made as aforesaid, with the intent to defraud the said company *are* any portion of their just and reasonable tolls upon any — the said passengers, he or they so offending shall be deemed guilty of willful and corrupt perjury, and shall, on conviction thereof, be subject to all the pains and penal-ies provided by law against that offence.

SEC. 4. This act shall not have the force and effect of law unless

and until the said Monongahela Navigation Company shall accept and continue to observe all the provisions of the act entitled "An act relating to the navigation of the Youghiogheny river," passed the fifteenth day of April, eighteen hundred and forty-five: Provided, however, that so soon as the said Monongahela Navigation Company, or any other company, shall proceed in the improvement of the Youghiogheny river, and shall erect and complete one dam and the necessary lock or locks in said river, then the said Monongahela Navigation Company shall be authorized to charge half tolls on the various crafts mentioned in the said act, of fifteenth April eighteen hundred and forty-five; and that so soon as a second dam, with the necessary lock or locks, shall be erected and completed in the said Youghiogheny river, the then condition imposed by
71 this section shall be released, and the provisions of the said act of fifteenth April, eighteen hundred and forty-five, shall cease to be obligatory on the said Monongahela Navigation Company.

(Approved March 24, 1846. Pamphlet Laws, page 168.)

A further supplement to the penal laws of this Commonwealth.

Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same:

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SEC. 3. The penalty imposed by the second section of the act entitled "A further supplement to the act entitled 'An act to authorize the governor to incorporate a company to construct a slack-water navigation in the Monongahela river,' approved the twenty-fourth day of March, eighteen hundred and forty-six," shall be fifty dollars; and the same shall be recoverable in like manner as if the penalty had been made fifty dollars in the said section of the said act.

(Approved April 17, 1846. Pamphlet Laws, page 362).

A further supplement, to an act authorizing the incorporation of the Monongahela Navigation Company.

SECTION 1. Be it enacted by the senate and the house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, That the president and managers of the Monongahela Navigation Company be, and they are hereby, authorized to open books of subscription at such places within the counties of Allegheny, Washington, Westmoreland, Fayette, and Greene, as they may think proper to indicate upon thirty days' notice, by publication in one or more newspapers published within each of the said counties, for the purpose of enlarging their capital stock, so as to enable them to
72 extend their improvement to the Virginia State line: Provided, the stock hereby authorized to be subscribed shall not exceed two hundred thousand dollars.

SEC. 2. That as soon as three thousand additional shares shall be subscribed to the stock of the said company for the purpose aforesaid, it shall be the duty of the said president and managers, to contract for the construction of so many additional locks and dams as may be required to secure a sufficient slack-water navigation from the borough of Brownsville to the said State line, or so many additional locks and dams as the amount of stock so subscribed as aforesaid shall in their estimation be sufficient to authorize them to place under contract.

SEC. 3. That in the prosecution of said extension, it shall be lawful for the said company to increase the height of dam No. 4, not exceeding two feet, after the completion of lock and dam No. 5, above Brownsville, and to construct the additional dams, in such manner and of such elevation as they may deem expedient, having regard, however, to the natural formation of the banks; and making compensation for any damage, direct or consequential, which may or has been occasioned to private property by the said dams, or those already constructed: Provided, that if the parties cannot agree in choosing five freeholders to view and assess the damages, the same shall hereafter be appointed by the court of common pleas of the proper county, and not by a justice of the peace, as is provided for in the eighth section of the act of incorporation, passed the thirty-first day of March, eighteen hundred and thirty-six: Provided, further, that said jurors shall be citizens of the county in which said damages are alleged to have been sustained, but shall not live or own real estate within ten miles of said improvement, nor shall any of them be stockholders in said Monongahela Navigation Company: And provided further, that said company shall be liable for all consequential damages resulting to the owner or owners of real property situate upon either side of said improvement.

SEC. 4. That the tolls received upon and the revenues arising from that part of the work between Brownsville and the Virginia State line shall form a separate and distinct fund, and the balance
73 thereof, after payment of expenses and repairs on that portion of the work, shall be divided semi-annually, *pro rata*, amongst the stockholders whose subscriptions may be applied, under this act, to the construction of the same, until the company shall have paid the debt incurred in the construction of the work below the borough of Brownsville; after which, the said tolls and revenues shall return to the common fund, and be distributed, with the other revenues of the said work, amongst all the stockholders thereof, in the proportion of the amount of stock held by them respectively: Provided, that the minimum through toll on the ascending transportation of passengers produce, and merchandise, destined to pass over any portion of the Baltimore and Ohio railroad, except coal and other minerals, shall not be less on said improvements than may be charged for an equal distance on the Pennsylvania canal.

SEC. 5. That the president and managers of said company shall have power, from time to time, to make such rules and regulations as may not be inconsistent with the laws of this State, in respect to

the weighing and inspecting of boats and other crafts, and their lading, the collection of tolls, and all other matters connected with the use or navigation of their improvement.

SEC. 6. That the president and managers of the said Monongahela Navigation Company be, and they are hereby, authorized to open books of subscription at such time and place within the city of Pittsburgh as they may think proper to direct, upon at least thirty days' notice thereof, by publication in one or more newspapers in the cities of Pittsburgh and Philadelphia, for the subscription of so much additional stock in the said company as shall be required to pay and satisfy the debt incurred in the construction of that portion of their improvement which is already completed over and beyond the amount of the capital stock already subscribed, paid in, and expended for the purpose; that the said books of subscription shall continue open for the purpose aforesaid, for the space of twenty days, and if at the expiration of that time the sum required shall not have been subscribed it shall be lawful for the said president and managers, and they are hereby required to enter, to the credit of the holders of the present
74 stock in the books of the said company, an additional share of stock for each and every share by them respectively owned and held therein, upon which said additional share or shares the treasurer of the said company shall, in lieu of all calls for the payment of any instalment or instalments thereupon, credit to the holders thereof, respectively, his, her, or their *pro rata* proportion, according to the amount of stock by them respectively owned of the amount applied from time to time, out of the tolls, income, profits, and revenues of the said company toward the satisfaction of the principal and interest of the debts incurred in the construction of that portion of their improvement, between the city of Pittsburgh and the borough of Brownsville; and as soon as the sum of fifty dollars shall be thus credited to each and every share of the said additional stock, it shall be the duty of the said president and managers to issue certificates therefor to the persons who may then be the holders of the original stock, and entitled thereto respectovely; and who shall thereafter vote, and be entitled to receive dividends upon the said new stock of the incomes or profits of the said company, as though the same had been originally subscribed at the opening of the books thereof: Provided, however, that any and every transfer that may be made of the present or old stock, or any portion thereof, by any of the holders thereof, antecedent to the payment of the whole of the said sum of fifty dollars, upon each and every of the shares of the said new or additional stock, shall be held and construed to carry with it the interest of the proprietor in the said new or additional stock, which, until that period, shall follow the ownership of the said original stock as an incident or accessory thereto, and be inseparable therefrom: Provided, that when the dividends of profits made by the company shall exceed ten per cent. per annum on the amount of the capital stock representing the cost of the work, one-half of the surplus above ten per cent., shall be paid into the treasury of the Commonwealth; and the clause in the

fifteenth section of the original act of incorporation — required an annual statement to be made to the legislature is hereby re-enacted.

SEC. 7. That the toll on coal shall not be raised by the company at any time above the rates now charged on that article.

75 SEC. 8. That so much of an act or acts of assembly as may be inconsistent with any of the foregoing provisions be and the same is, hereby repealed.

(Approved February 9, 1848. Pamphlet Laws, page 39.)

A supplement to an act entitled "An act to authorize the governor to incorporate a company to make a lock navigation on the Youghiogheny river," passed the eighteenth day of April, anno Domini eighteen hundred and forty-three.

SECTION ONE. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met and — is hereby enacted by the authority of the same, That any defect or irregularity in the proceedings of the commissioners appointed by the original act, in taking subscription to and organizing the said company, and any defect or irregularity in the proceedings of the board of managers of said company, in organizing and conducting the affairs of the same so far as the said defect or irregularity may have proceeded from the neglect or omission of the said commissioners and board of managers fully to comply with the requisitions of the first section of said act, in regard to the opening of books for the subscription of stock, or with the requisition of the proviso of the first section of said act, shall be and the same are hereby remedied and supplied; and the acts and proceedings of the said commissioners and board of managers which were in contravention of the said first section, and the proviso thereto, shall be, and are hereby, declared valid and legal as if the same had been fully complied with.

SEC. 2. That from and after the passage of this act, the name, style, and title of the said company shall be the "Youghiogheny Navigation Company."

SEC. 3. That it shall be the duty of the said Youghiogheny Navigation Company to remove the obstructions to the safe navigation of said river from its mouth at McKeesport to the borough of West Newton, and keep the same safe for the navigation thereof; and that the said company shall enjoy the privilege, right, and power

76 to collect toll on that part thereof from the mouth of said river to dam and lock No. 1, at corresponding rates with the pools above; and also that the said company shall have and enjoy like rights, privileges, advantages, remedies, and powers, as well in regard to the recovery of damages, penalties and forfeitures for injuries done to the navigation, or any of the works or property of said company, as in regard to the collection of subscriptions of stock in said company, as are given and granted to the Monongahela Navigation Company by an act or acts of assembly heretofore passed in relation thereto: Provided, however, that the said company shall

reimburse to the Monongahela Navigation Company the amount of money which may have been expended by them in payment of damages for injuries done to private property along the said last described portion of the said Youghiogheny, from the mouth thereof to the first dam as aforesaid, by reason of the back water or flowage occasioned by the construction of dam No. 2 of the Monongahela Navigation Company, to the ascertained and agreed amount of four thousand dollars, to be paid in the capital stock of said Youghiogheny Navigation Company, which amount the president and managers of the said Monongahela Navigation Company are hereby authorized to subscribe to the said capital stock. And provided also that the said Monongahela Navigation Company shall not at any time, charge or collect a greater amount of toll from boats, *ect.*, that pass out of the mouth of the Youghiogheny river into the Monongahela river than they did from the same distance on their own improvement: Provided, moreover, that the said Youghiogheny Navigation Company shall be liable for any damages that may be occasioned to any property situated on either side of said improvement, in like manner as the Monongahela Navigation Company is now made liable by the third section of an act entitled "A further supplement to an act authorizing the incorpoeation of the Monongahela Navigation Company," approved the ninth day of February eighteen hundred and forty-eight: And provided further, that said viewers shall take into consideration the advantages arising from said improvement.

SEC. 4. That the board of managers of the Youghiogheny Navigation Company shall have power to make such rules and
77 regulations as may not be inconsistent with the laws of this State, in respect to the collection of tolls and all other matters connected with the use or navigation of their improvement from the mouth of said river to West Newton.

SEC. 5. That the said company at no time hereafter charge more than half toll or poolage on any raft or boat, or the cargo thereof, descending said river and not intending to return, which may have been loaded above the line dividing the counties of Fayette and Westmoreland: Provided, that rafts or boats shall not use the harbors created by said improvement for a period of more than ten days: And provided further, that after the West Newton and Connellsville Navigation Company shall have completed the first dam and lock, the said Youghiogheny Navigation Company may charge such tolls as they may by law charge on freight boats and rafts loaded below said line.

SEC. 6. That Henry Greenewalt, guardian of Angelina and Caleb Greenewalt, minor children of Daniel Greenewalt, deceased, of Westmoreland county, be and he is hereby, authorized to sell and convey to the Youghiogheny Navigation Company a certain part of a tract of land lying on the Youghiogheny riAer, and adjoining dam No. 2 on said improvement and not exceeding in area one acre.

(Approved March 15, 1849. Pamphlet Laws, page 170.)

A further supplement to the act incorporating the Monongahela Navigation Company.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That from and after the passage of this act, all rafts, flats, and flat-boats descending the river, from any point more than three miles above Brownsville, and within the State line of Pennsylvania, and not intending to return, shall not be subject to a higher toll than seventy-five cents per lock, including cargo until the company shall complete the first dam above Brownsville: Provided, that no such craft shall take in any additional cargo on the line of the improve-
78 ment, nor use or lie by in any of the harbors created by the improvement, for a period of more than ten days, without being subject to the payment of the regular tolls.

SEC. 2. That the present rates of toll on coal shall be reduced by the company fifty per cent. on pools numbers three and four, on all coal carried in flat-boats intended to pass down the Ohio river; and in consideration thereof the legislature shall not further reduce the tolls until the present indebtedness of the company shall have been fully paid, and a dividend of eight per cent. per annum paid to the stockholders; and no reduction shall be made at any time, so as to afford a less dividend than eight per cent. per annum on the capital stock: Provided, that the terms of this act shall not be so construed as to affect or alter the provisions of the act passed in the year 1848, requiring the company to pay one-half the dividends above ten per cent. per annum into the treasury of the Commonwealth.

SEC. 3. That so much of any act or acts to which this is a supplement as are hereby altered or amended shall be, and the same are hereby, repealed.

SEC. 4. The legislature reserves the right to alter or amend the charter of said company at any time hereafter, should they violate, abuse, or misuse the privileges granted and such fact be previously found by the verdict of the jury and judgment of the proper court thereon, under a writ of *scire facias* issued against them at the suit of any individual or individuals who may be aggrieved.

(Approved March 21, 1849. Pamphlet Laws, page 215.)

An act to facilitate the passage of coal and coke boats over the Monongahela navigation improvement, and to incorporate the Marine Transportation Company of Philadelphia.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That no coal or coke boat shall unnecessarily stop, lie by, or detain in any lock, or within two hundred yards of any lock, nor shall they lie
79 more than two pair abreast for a distance of three hundred yards further above any lock, nor more than four pair of boats abreast at any place above five hundred yards, without permission of the lock-keeper, under a penalty of twenty-five dollars for every boat.

SEC. 2. No coal or coke boat shall be permitted to come within two hundred yards of a lock on the Monongahela navigation aforesaid, until the lock is ready, without the consent of the lock-keeper; and they shall be passed in the order of their position, viz: to commence with those within two hundred yards of the lock—inside boat or pair of boats first, the others to drop down so that each tier of boats shall be passed in the order they lie; and no coal or coke boats or boat arriving shall be permitted to come nigher to the lock than their regular place or tier. And when the lock-keeper is prepared to pass boats, they will in the order above mentioned, without delay, drop their boats down and pass through the lock otherwise, or forfeit their turn; but as cases may occur that light boats may go on when heavy boats cannot, then in such cases said light boats can at the discretion of the lock-keeper be passed through as they arrive within two hundred yards of the lock. The penalty for every violation of this section shall be ten dollars for each and every boat.

SEC. 3. That in case of the arrival of a large number of boats and a falling river, the lock-keeper shall be authorized to stop all towboats from passing as long as he may deem necessary.

SEC. 4. That the lock-keeper for the company or any person or persons aggrieved by any violation of this act, be, and they are hereby, authorize- to enforce the foregoing provisions against the owners, pilots, or other persons having said boat or boats in charge, by process now known or which may hereafter be authorized by law, before any magistrate of the proper county or alderman of the city of Pittsburgh, one-half of the penalty to go to the State and the other half to the prosecutor.

(Approved April 14, 1851. Pamphlet Laws, page 563.)

A further supplement to the act incorporating the Monongahela Navigation Company.

80 SECTION 1. Be it enacted by the senate and the house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That for the purpose of enabling the Monongahela Navigation Company to extend their works, the said company are hereby authorized to increase their capital by receiving subscriptions thereto, to any amount not exceeding three hundred thousand dollars; and the said company are hereby required to put lock and dam number five under contract within sixty days after the passage of this act, and complete the same for navigation by the first of June, anno Domini eighteen hundred and fifty-five, and sooner if practicable; and that lock and dam number six shall be put under contract within the present year, and completed on or before the first day of December, eighteen hundred and fifty-five, and sooner if practicable; and that a sufficient number of locks and dams to continue the improvement to the Virginia State line, above lock and dam number six, shall be put under contract, as soon as twenty-five thousand dollars shall be subscribed to the capital stock of said company by the citi-

zens of Greene and Fayette counties, Pennsylvania, and the citizens of Virginia, and shall be completed within one year after said subscription is made; but in no event shall the completion of the lock and dam above number six be delayed after the first day of December, eighteen hundred and fifty-seven, but shall, at said time, be fully completed for all the purposes of navigation, and sooner if practicable: Provided, that the said company shall not hereafter be liable for damages which may be done to property lying in the vicinity of any portion of their line, except as is provided by an act entitled "An act to authorize the governor to incorporate a company to make a lock navigation on the River Monongahela," passed the thirty-first day of March, anno Domini eighteen hundred and thirty-six, and an act entitled "An act declaratory of the act passed on the thirty-first day of March, eighteen hundred and thirty-six, entitled "An act to authorize the governor to incorporate a company to make a lock navigation on the River Monongahela," approved on the twenty-fifth day of April, eighteen hundred and forty-four.

81 SEC. 2. That the said company are hereby authorized to issue stock, and distribute the same, or the proceeds of the same thereof, *pro rata*, amongst the owners of the present stock of the company, to an amount equal to the sum or sums which may have been expended in the construction of their improvement, and which has not heretofore been represented by stock in the company; and also for such further amount as may hereafter be applied, out of the earnings of the company, towards the construction of the extension hereby authorized, or to the payment of the principal or interest upon any bonds or obligations of debt which have been or may be issued for the construction or extension of said improvement.

SEC. 3. That when lock and dam No. 5 shall have been completed and ready for navigation, the said company shall be entitled to charge and receive, on any part of their improvement, such rates of toll and charges as shall be just and reasonable: Provided always, that the net dividends shall not exceed the limitation prescribed by the fifth section of the supplement to an act entitled "An act to authorize the governor to incorporate a company to make a lock navigation on the River Monongahela," passed June twenty-four, anno Domini eighteen hundred and thirty-nine; the said dividends to be declared semi-annually, on the second Thursday of January of July of each year: Provided, that the rates of toll and charges upon coal shall not at any time be increased above the rates at present charged upon the same.

SEC. 4. That all subscriptions heretofore made to the stock of said company are hereby legalized and made valid and effectual, to all intents and purposes, notwithstanding any defect in the manner or form of subscribing the same; and that said company are hereby authorized to pay interest at the rate of six per centum per annum upon all payments which may be made on account of subscriptions to the increased capital stock authorized by this act, until the completion of the navigation to the Virginia State line, after which

time the owners of such increased stock shall be entitled to the same privileges and immunities as the other stockholders of said company.

SEC. 5. That the annual meeting of stockholders for the election of officers as provided for in the fourth section of the charter of said company, shall hereafter be held on the second Thursday of
82 January in each and every year: and at all the meetings of the stockholders each stockholder shall be entitled to one vote for each and every share of stock held by him.

SEC. 6. That so much of any act or acts of assembly as are hereby altered, amended, or supplied, be, and the same is hereby repealed.

(Approved January 25, 1854. Pamphlet Laws, page 8.)

A further supplement to the act incorporating the Monongahela Navigation Company.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the times limited for the completion of the locks and dams, numbers five and six, by the Monongahela Navigation Company as provided by the supplement to the charter of said company, passed the 25th day of January, eighteen hundred and fifty-four, be and the same are hereby, extended to the 31st day of December, eighteen hundred and fifty-five; and the time limited for the completion of the works above dam number six to the Virginia State line, be, and the same is hereby, extended for the further period of four years from and after the passage of this act; and so much of said act as is inconcistent herewith, be, and the same is hereby, repealed.

(Approved May 4, 1865. Pamphlet Laws, page 60.)

Further supplement to the act incorporating the Monongahela Navigation Company, approved March thirty-one, eighteen hundred and thirty-six.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That whenever the construction of sufficient locks and dams to extend the slack water on the Monongahela river from the Pennsylvania State line to Morgantown, in Monongalia county, Virginia, shall
83 have been commenced, it shall be the duty of the Monongahela Navigation Company to commence the construction of lock and dam number seven, in such manner and on such plan as will extend the navigation from its present terminus to the Virginia State line, and complete the same simultaneously with the completion of the works extending to Morgantown; that so much of all acts heretofore passed as have reference to the time of the completion of said improvement to the Virginia State line be, and the same are hereby, repealed.

(Approved April 8, 1857. Pamphlet Laws, page 176.)

An act to authorize the issue of bonds by the Monongahela Navigation Company.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, that it shall be lawful for the president and managers of the Monongahela Navigation Company to take up any or all of the bonds of the said company now outstanding, as they respectively mature, by the issue and substitution of other bonds, with the consent of the holders of the said outstanding bonds, on such terms and at such rates of interest, not exceeding eight per pent. per annum, as may be agreed upon between the parties, and to mortgage the whole or any part of their tolls, revenues, or other property, for the security thereof; and it shall be lawful for any trustee, executor, administrator, or guardian, holding any of the same outstanding bonds as an investment or trust funds, to renew and reinvest the same in the bonds authorized by this act.

(Approved February 12, 1862. Pamphlet Laws, page 504.)

A supplement to an act to facilitate the passage of coal and coke boats on the Monongahela improvement and to incorporate the Marine Transportation Company of Philadelphia, approved the fourteenth day of April, eighteen hundred and fifty-one.

SECTION 1. Be it enacted by the senate and the house of representatives of the Commonwealth of Pennsylvania, in general
84 assembly met, and it is hereby enacted by the authority of the same, that the penalty provided by the first section of the act to which this is a supplement shall hereafter be, for the first offence, two hundred dollars, and for the second offence five hundred dollars; and the penalty provided in the second section of said act shall also be, for the first offence, two hundred dollars, and for the second, five hundred dollars; such penalties to be recovered in the manner hereinafter provided, from the owner or owners, or the pilot or other person having charge of the coal or coke boats, by which the provisions of said law may have been broken.

SEC. 2. That the penalties hereinbefore provided for each infraction of the provisions of the first and second sections of the act to which this is a supplement shall be collected as sums of like amount are now collectible, by law, in the court of common pleas, in the county of Allegheny, from the owner or owners of the boats by which the provisions of the first and second sections of said act may have been broken, or from the pilot or other person having charge of such boat or boats; and in all cases of the infraction of said law, at or near the first lock of the said improvement, the penalty so recovered shall go to the guardians of the poor of the city of Pittsburgh and in all cases of infraction of said law at or near any of the other locks of said improvement, the penalty so recovered shall go to the directors of the poor of the county within which such lock is situate; and suits for the recovery of the penalties provided by this act shall be brought in the name of the guardians of the poor

of the city of Pittsburgh, or of the directors of the poor of the proper county, as the case may be.

SEC. 3. That the Monongahela Navigation Company may erect and construct, at any or all of the locks of said company, a pier or piers near to the lower end of such lock or locks in the Monongahela river, of such length and width as they may deem advisable, with snubbing posts or rings attached thereto for the anchorage of boats, flats, barges, or other craft navigating said river, and also such piers or pier as they may deem necessary above the locks for the purposes of mooring or anchoring such boats, flats, barges, 85 or other crafts and facilitating their passage through the locks and may make and enforce such regulations as to the use of said piers for the purposes aforesaid as they may find expedient and necessary, and charge for the use thereof such rate as the board of managers may fix.

SEC. 4. That the Monongahela Navigation Company may construct a chute in any or all of the dams of their improvement for the passage of craft navigating said river, and charge vessels, boats, barges, or other craft, passing over or through such chute or chutes, such rate of toll as the board of managers may fix, not exceeding fifty per centum above the toll chargeable for similar craft passing through the locks.

SEC. 5. That instead of charging poolage and lockage on coal and coke, as now authorized to do, the Monongahela Navigation Company may hereafter charge such rates of toll on those articles as lockage, only as shall not exceed at each lock the total amount heretofore charged as lockage and poolage for that lock and the entire pool above it, and that so much of any act or acts of assembly as may be inconsistent herewith are hereby repealed.

SEC. 6. That in case of the death or resignation of any member of the board of managers of said company, the said board may elect any stockholder of said company to fill the vacancy thus occurring until the next annual election.

(Approved May 20, 1864. Pamphlet Laws, page 916.)

An act to provide additional revenue for the use of the Commonwealth.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the president, treasurer, cashier, or other financial officer of every railroad company, steamboat company, canal company, and slack-water navigation company, and all other companies now or hereafter doing business within this State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, *for transportation* and toll, or shall receive tolls 86 only, except turnpike companies, plank, road companies, and bridge companies, shall, within thirty days after the first days of January, April, July, and October of every year, make return in

writing to the auditor general, under oath of affirmation, stating fully and particularly the number of tons of freight carried over, through, or upon the works of said company, for the three months immediately proceding each of the above-mentioned days, and each of said companies, except as aforesaid, shall, at the time of making such return, pay to the State treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax at the following rates, viz: First, on the product of mines, quarries and claybeds, in the condition in which said products may be taken therefrom, two cents. Second, on hewn timber, animal food, including live stock; also on the product of the forest, vegetable, and other agricultural products, the value of which has not been increased by labor, three cents. Third, on all other articles, five cents. Where the same freight can be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if — had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof. Corporations whose lines of improvement are used by others for the transportation of freight, and whose only earnings arise from the tolls charged for such use, are authorized to add the tax hereby imposed to said tolls and collect the same therewith, but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements: Provided, That every company now or hereafter incorporated by this Commonwealth, whose line extends into any other State, and every corporation, company, or individual of any other State holding and enjoying any franchises, property, or privileges whatever in this State by virtue of the laws thereof, shall make returns of freight and pay for the freight carried over, through, and upon that portion of their lines within this State as if the whole of their respective lines were in this State.

(Approved August 25, 1864. Pamphlet Laws, 988.)

87 An act to enable railroad, canal, and slack-water navigation companies to straighten, widen, deepen, and otherwise improve their lines of railroads, canal, and slack-water navigation and the bridges, aqueducts, piers, and structures thereof.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that it shall and may be lawful for any railroad, canal, and slack-water navigation company, now or hereafter incorporated by or under any law of this Commonwealth, to straighten, widen, deepen, enlarge, and otherwise improve the whole or portions of their lines of railroads, canals, and slack-water navigation, and the bridges, crossings, sidings, aqueducts, piers, and structures thereof, and make new feeders, whenever, in the opinion of the board of directors of any such company, the same may be necessary for the better securing the safety of persons and property, and increasing the facilities and capacity for the transportation of traffic thereon, and for such pur-

poses to purchase, hold, and use, or enter upon, take and appropriate land and material: Provided, that before any such company shall enter upon or take possession of any such lands and materials, they shall make ample compensation to the owner or owners thereof, or parties interested therein, tender adequate security therefor.

SEC. 2. That where any such company cannot agree with the owner or owners or parties interested in such land and materials, for the compensation proper for the damage done or likely to be done, or where, by reason of the absence or legal incapacity of any such owner or owners, or parties interested therein, no such compensation can be agreed upon, the same shall be ascertained and paid in the manner provided *provided* in the eleventh section of the act regulating railroad companies, approved February nineteenth, anno Domini, eighteen hundred and forty-nine.

(Approved March 17, 1869. Pamphlet Laws, page 12.)

An act authorizing corporations to increase their bonded obligations and capital stock.

88 SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same That it shall and may be lawful for any corporation, created by or existing under the laws of this Commonwealth to increase its bonded obligations and secure the same by mortgage, and also to increase its capital stock from time to time, to any amount not exceeding fifty per cent of the amounts heretofore authorized, and to sell or dispose of the same on such terms and conditions as to said corporations may seem proper: Provided, however, that this act shall not apply to any corporation until it is duly accepted by it, whereupon it shall be taken and deemed to be a part of its act of incorporation, and be made under its authority; and a certificate, duly attested by the president and treasurer of said company, under its corporate seal, setting forth the acceptance of the act, with the amounts and character of the increase, shall be filed in the auditor general's office of the Commonwealth, and a copy thereof be filed with the secretary of state: And provided further, that on all such increase the State shall be entitled, *pro rata*, to the same bonus or tax that is now assessed by law on like amounts of the existing capital of the respective corporations.

(Approved December 29, 1869. Pamphlet Laws; "Appendix, 1879," acts of 1870, page 1374.)

A supplement to the act approved May one, eighteen hundred and sixty-eight, entitled, "An act to revise, amend, and consolidate the several acts relating to corporations, brokers, and bankers."

Whereas the Monongahela Navigation Company is prohibited by its charter from transporta*ting* freight, and any tax on transportation of freight on the navigation of said company must be paid by individuals engaged in such transportation, therefore,

SEC. —. Be it enacted by the senate and house of representatives

of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that so much of the first section of the act of August twenty-five, anno
89 Domini eighteen hundred and sixty-four, entitled, "An act to provide additional revenue for the Commonwealth," and of the seventh section of the act of May one, anno Domini eighteen hundred and sixty-eight, entitled, "An act to revise, amend, and consolidate the several laws relating to corporations, brokers, and bankers," as applies to the Monongahela Navig-tion Company, be, and the same are hereby repealed; and no further proceedings shall be taken to collect any money on account of such tax from said company: Provided, that no moneys already paid into the State treasurer on account of such tax shall be refunded to said company in consequence of the passage of this act: And provided also, that said company shall hereafter be liable to all taxes imposed by the act of May one, eighteen hundred and sixty-eight, upon canal companies, except the tax on tonnage.

(Approved April 1, 1870. Pamphlet Laws, page 738.)

And further offered evidence tending to show that in pursuance of the powers so granted the said company has constructed seven dams on the Monongahela river, each furnished with one or more locks, and which dams and locks from a system of navigation extending from lock and dam number 1, at the city of Pittsburgh, to lock and dam number seven, in the State of Pennsylvania, near the line between the States of Pennsylvania and West Virginia.

And further offered evidence tending to show that prior to the construction of said company's works—that is to say, prior to the year 1841—the navigation of the Monongahela river was conducted altogether in small vessels, including small steamboats of not exceeding a tonnage of fifty tons, which could not ascend the river at all seasons of the year, but only during limited periods of the year, depending on the rises in the river; that the trade or commerce on said river prior to its improvement by said company's works was insignificant, particularly in the article of coal, for which the river in its natural condition did not furnish sufficient harbors or places of shipment, and that by the construction and maintenance of said company's works there has been created an existing navigation for large steamboats at all seasons of the year, and facilities for a large commerce, particularly in the article of coal, of which there
90 is now transported in a single day as much as was before the construction of the company's works transported in an entire year.

And, further, that lock and dam number 7 was constructed under and by virtue of the powers granted by the act of the General Assembly of Pennsylvania approved March 31st, 1826, and its supplements, above set forth, and particularly in pursuance of the act of assembly of the State of Pennsylvania approved April 8, 1857, above set forth; which said act is in the following terms:

poses to purchase, hold, and use, or enter upon, take and appropriate land and material: Provided, that before any such company shall enter upon or take possession of any such lands and materials, they shall make ample compensation to the owner or owners thereof, or parties interested therein, tender adequate security therefor.

SEC. 2. That where any such company cannot agree with the owner or owners or parties interested in such land and materials, for the compensation proper for the damage done or likely to be done, or where, by reason of the absence or legal incapacity of any such owner or owners, or parties interested therein, no such compensation can be agreed upon, the same shall be ascertained and paid in the manner provided *provided* in the eleventh section of the act regulating railroad companies, approved February nineteenth, anno Domini, eighteen hundred and forty-nine.

(Approved March 17, 1869. Pamphlet Laws, page 12.)

An act authorizing corporations to increase their bonded obligations and capital stock.

88 SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same That it shall and may be lawful for any corporation, created by or existing under the laws of this Commonwealth to increase its bonded obligations and secure the same by mortgage, and also to increase its capital stock from time to time, to any amount not exceeding fifty per cent of the amounts heretofore authorized, and to sell or dispose of the same on such terms and conditions as to said corporations may seem proper: Provided, however, that this act shall not apply to any corporation until it is duly accepted by it, whereupon it shall be taken and deemed to be a part of its act of incorporation, and be made under its authority; and a certificate, duly attested by the president and treasurer of said company, under its corporate seal, setting forth the acceptance of the act, with the amounts and character of the increase, shall be filed in the auditor general's office of the Commonwealth, and a copy thereof be filed with the secretary of state: And provided further, that on all such increase the State shall be entitled, *pro rata*, to the same bonus or tax that is now assessed by law on like amounts of the existing capital of the respective corporations.

(Approved December 29, 1869. Pamphlet Laws; "Appendix, 1879," acts of 1870, page 1374.)

A supplement to the act approved May one, eighteen hundred and sixty-eight, entitled, "An act to revise, amend, and consolidate the several acts relating to corporations, brokers, and bankers."

Whereas the Monongahela Navigation Company is prohibited by its charter from transport*at*ing freight, and any tax on transportation of freight on the navigation of said company must be paid by individuals engaged in such transportation, therefore,

SEC. —. Be it enacted by the senate and house of representatives

of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that so much of the first section of the act of August twenty-five, anno
89 Domini eighteen hundred and sixty-four, entitled, "An act to provide additional revenue for the Commonwealth," and of the seventh section of the act of May one, anno Domini eighteen hundred and sixty-eight, entitled, "An act to revise, amend, and consolidate the several laws relating to corporations, brokers, and bankers," as applies to the Monongahela Navig-tion Company, be, and the same are hereby repealed; and no further proceedings shall be taken to collect any money on account of such tax from said company: Provided, that no moneys already paid into the State treasurer on account of such tax shall be refunded to said company in consequence of the passage of this act: And provided also, that said company shall hereafter be liable to all taxes imposed by the act of May one, eighteen hundred and sixty-eight, upon canal companies, except the tax on tonnage.

(Approved April 1, 1870. Pamphlet Laws, page 738.)

And further offered evidence tending to show that in pursuance of the powers so granted the said company has constructed seven dams on the Monongahela river, each furnished with one or more locks, and which dams and locks from a system of navigation extending from lock and dam number 1, at the city of Pittsburgh, to lock and dam number seven, in the State of Pennsylvania, near the line between the States of Pennsylvania and West Virginia.

And further offered evidence tending to show that prior to the construction of said company's works—that is to say, prior to the year 1841—the navigation of the Monongahela river was conducted altogether in small vessels, including small steamboats of not exceeding a tonnage of fifty tons, which could not ascend the river at all seasons of the year, but only during limited periods of the year, depending on the rises in the river; that the trade or commerce on said river prior to its improvement by said company's works was insignificant, particularly in the article of coal, for which the river in its natural condition did not furnish sufficient harbors or places of shipment, and that by the construction and maintenance of said company's works there has been created an existing navigation for large steamboats at all seasons of the year, and facilities for a large commerce, particularly in the article of coal, of which there
90 is now transported in a single day as much as was before the construction of the company's works transported in an entire year.

And, further, that lock and dam number 7 was constructed under and by virtue of the powers granted by the act of the General Assembly of Pennsylvania approved March 31st, 1826, and its supplements, above set forth, and particularly in pursuance of the act of assembly of the State of Pennsylvania approved April 8, 1857, above set forth; which said act is in the following terms:

"Further supplement to the act incorporating the Monongahela Navigation Company approved March thirty-one, eighteen hundred and thirty-six.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That whenever the construction of sufficient locks and dams to extend the slack water on the Monongahela river from the Pennsylvania State line to Morgantown, in Monongalia county, Virginia, shall have been commenced, it shall be the duty of the Monongahela Navigation Company to commence the construction of lock and dam number seven in such manner and on such plan as will extend the navigation from its present terminus to the Virginia State line, and complete the same simultaneously with the completion of the work extending to Morgantown; that so much of all acts heretofore passed as have reference to the time of completion of said improvements to the Virginia State line, be, and the same are hereby repealed."

And further offered evidence tending to show that Colonel William E. Merrill had charge, for the United States, as engineer under the War Department, of the public works of the United States on the Rivers Monongahela, Allegheny, and Ohio, and at the times exhibited in the dates of the following letters the correspondence herein set out took place between the president of the Monongahela Navigation Company and the said William E. Merrill:

91 "U. S. ENGINEER OFFICE, No. 82 WEST THIRD ST.,
CINCINNATI, OHIO, *November 6th*, 1878.

To the president and directors of the Monongahela Navigation Company, Pittsburgh, Pa.

GENTLEMEN: Understanding it to be your desire that the United States should build a lock and dam on the Monongahela at or near the mouth of Dunkard's creek, in the State of Pennsylvania, and consequently upon a portion of the river where your company hold exclusive privileges by virtue of various acts of the legislature *if* said State, I would therefore respectfully request that you execute and forward to this office such legal documants pertinent to the case as will transfer to the U. S. whatever rights your company may have to build a lock and dam in the above-named vicinity. I would also request a formal agreement from your company to begin work on your own lock and dam No. 7 as soon as the United States shall begin work on the lock and dam in the vicinity of Dunkard's creek.

Respectfully, your obedient servant,

WILLIAM E. MERRILL,
Major Engineers & Bvt. Col."

"OFFICE OF MONONGAHELA NAV. CO.,
PITTSBURGH, *Nov. 15th*, 1878.

Col. W. E. Merrill, major of engineers & bvt. col.

DEAR SIR: Yours of the 6th inst. was received the day after the last meeting of our board. At the next meeting, Dec. 4, I will lay it before them and give you an official reply. I have, however, consulted our solicitor and several members of the board, and
92 have no hesitation in assuring you we will execute a release, transfer, or quitclaim to the U. S. of all rights granted to us by the State of Penna., so far as said rights and obligations apply to that portion of the river above the mouth of Dunkard creek or such point as the Government may select in that vicinity, provided the Gov't will proceed to construct a slack-water navigation from said point to the West Virginia State line and thence to Morgantown, W. Va. We will also, if desired by the U. S., extend our release downward to the mouth of Jacob's creek, where our company have located lock and dam No. 7. We will also enter into an agreement with the U. S., if they desire it, that upon there being sufficient appropriations made by Congress to secure the completion of a lock and dam in the vicinity of Dunkard creek and said work having been definitely located and commenced, that we will construct and complete our lock and dam No. 7 so that the navigation can be opened simultaneous on both. If you have any perculiar form or style with regard to these papers please send me such suggestions as you may think proper so that I may have them before our next meeting.

Respectfully yours, J. K. MOORHEAD,
Pres't Mon. Nav. Co."

"U. S. ENGINEER OFFICE, No. 82 WEST THIRD ST.,
CINCINNATI, O., *November 25th*, 1878.

Gen. J. K. Moorhead, Pittsburgh, Pa.

GENERAL: I did not reply to your last letter, as I expected to see you in Pittsburgh. I called at your office at about half past nine on Tuesday, the 19th, but you were not in. I went up the Monongahela that afternoon, but on my return I again tried to see you, and Gen. Sweitzer has probably already told you why I failed.
93 You ask if there is any special form of transfer of rights over the Monongahela that I desire shall be used. I know of no special form, but I suppose that whatever document your attorney will prepare will be satisfactory. All I want is full right to build No. 8 whenever we may choose in the vicinity of Dunkard creek. I desire that your company will promise to raise the level of pool No. 7 to height of 10 ft. above the present surface of pool No. 6. It is immaterial whether you lower No. 6 or not provided you make the dead low water of your new pool 10 ft. above the present low water of No. 6. If I am assured on that point I can locate No. 8 intelligently and so as to secure a 6-foot navigation over its lower water site. I find on further examination that the sites are less favorable than I had anticipated. I regret to state that work on the

Monongahela has been stopped by high water and will not be resumed this season.

Respectfully, your obedient servant,

WM. E. MERRILL,
Maj. Engineer- & B'v't Col."

U. S. ENGINEER'- OFFICE, CUSTOM-HOUSE,
CINCINNATI, O., *March* 24, 1881.

Hon. J. K. Moorhead, president Mon. Nav. Co., Pittsburgh, Pa.

SIR: The last river and harbor bill contains the following appropriation:

"Improving Monongahela river, West Virginia and Pennsylvania, $25,000, but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven, at Jacob's creek, and until said company shall, in manner satifactorily to the Secretary of War, give assurance of their ability and purpose to complete the same."

94 You will therefore see that my work on number eight is wholly dependent on your work on number seven.

I have therefore to urge on your company that you will, at the earliest date possible, "undertake in good faith the building of lock and dam number seven," and that you will give the Secretary of War satisfactory assurance of your ability and purpose to complete it.

I would therefore suggest that it might be useful for your secretary to communicate at once to the Secretary of War such facts as to the financial resources of the company and its intentions about number seven as will satisfy him on the points specially left to his discretion and unlock the appropriation so that it may be used this summer.

Respectfully, your obedient servant,

WM. E. MERRILL,
Maj. En'g'rs & B'v't Col.

And further offered in evidence the act of Congress of the United States passed 3 March, 1881, published in U. S. Statutes at Large, vol. 21, page 471; which said act is in the words following:

"An act making appropriations for the construction, completion, repair, and preservation of certain works on rivers and harbors and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, and to be expended under the direction of the Secretary of War, in the construction, completion, repair, and preservation of the public works hereinafter named:

* * * * * * *

'Improving Monongahela river, West Virginia and Pennsylvania, $25,000; but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven at Jacob's creek, and until said company shall, in manner satisfactory to the Secretary of
95 War, give assurance of their ability and purpose to complete the same.'"

And further offered in evidence the minutes of a meeting of the board of directors of the Monongahela Navigation Company under date of April 6, 1881; which minutes are as follows:

"The president also referred to letter received from Col. Merrill, and after the reading of the letter the following resolutions were adopted:

"Whereas Congress has made an appropriation for the commencement of the building of lock and dam number eight in the Monongahela river, the payment of which appropriation is made to depend upon the Secretary of War being satisfied of the *bona fide* intention of this company to construct lock and dam number seven and of their financial ability to complete the same; and

"Whereas Col. Merrill, of the U. S. engineers, in charge of the Government improvement of the Monongahela river, has requested this company to furnish the Secretary of War with satisfactory assurances in relation thereto: Therefore

"Resolved, That it is the *bona fide* purpose and intention of this company to construct lock and dam number seven in the Monongahela river in the manner and at the time required of them by the acts of assembly of the State of Pennsylvania—that is to say, so to complete said lock and dam number seven that the same shall be ready for use as soon as the requisite locks and dams above lock and dam number seven, constructed or about to be constructed by the Federal Government, shall also be finished and ready for use, so as to complete the slack water of said river from Pittsburgh, Pennsylvania, to Morgantown, Virginia.

"Resolved, That the secretary of this company be directed to forward a copy of the foregoing resolution, together with copies of the company's annual report showing the intention of the company and their ability to complete this work, to Col. Merrill and also to the Secretary of War."

And further offered evidence tending to show that notice of the action of the company as exhibited in the minutes above set forth was given to the Secretary of War by the Secretary of the Mo-
96 nongahela Navigation Company.

That subsequently a letter was received by the Monongahela Navigation Company from Col. William E. Merrill in words following:

U. S. ENGINEER OFFICE,
CUSTOM-HOUSE, CINCINNATI, OHIO, *May* 4, 1881.

Gen. J. K. Moorhead, pres. Monongahela Navigation Co., Pittsburgh, Pa.

SIR: I have just received official notice from the Secretary of

War, through the chief of engineers, that the resolution and documents relative to the construction of lock and dam No. 7 on the Monongahela river, forwarded to this office by your company in April last (duplicates sent to the Hon. Secretary of War), have been considered as fully meeting the requirements of the proviso in the last appropriation for the improvement of the above-named river prohibiting the expenditure of the money appropriated "until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven at Jacob's creek and until said company shall, in a manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

I have been officially directed to notify your company of this decision of the Secretary of War.

The only obstacle now remaining to prevent immediate work at the mouth of Dunkard is the necessity of waiting until the land is purchased and paid for. This matter is yet in the hands of the attorney general. I am compelled to await his action.

Respectfully, your obedient servant,

WM. E. MERRILL,
Major of Engineers.

97 That thereupon the construction of lock and dam number seven was begun by the Monongahela Navigation Company in 1882 and completed in 1884.

And that during the time of the above correspondence the said William E. Merrill was an engineer in the service of the United States, and was in charge, under the directions of the War Department of the United States, of the public works of the United States on the Rivers Monongahela, Allegheny, and Ohio.

And at the trial of the cause the court, at the request of the Monongahela Navigation Company, found specially the following facts upon the testimony in the cause:

First. That the Monongahela Navigation Company is a corporation of the State of Pennsylvania, created by the act of March thirty-first, 1836, and numerous supplements, for the purpose of constructing and maintaining an artificial navigation of the Monongahela river by means of locks and dams within the limits of the State of Pennsylvania, and with the right to collect tolls for the use of said locks and dams.

Answer. The court so finds.

Second. That in pursuance of the powers so granted by the State of Pennsylvania the said company has constructed seven dams, each furnished with one or more locks, which form an existing system of navigation extending from "lock and dam No. 1," at the city of Pittsburgh, to "lock and dam No. 7," near the line between the States of Pennsylvania and West Virginia.

Answer. The court so finds.

Third. That the navigation of the Monongahela river prior to the construction of said company's works was restricted to the use of small vessels at the time of freshets and of small steamboats, not

exceeding a tonnage of 50 tons, which could only ascend the river at limited and uncertain times; that the trade and commerce on said river prior to its improvement by the company's work was insignificant, particularly in the article of coal, for which the river did not in its natural condition furnish sufficient harbors or places of shipment.

98 That by the construction and maintenance of the said company's works there has been created an existing navigation for large steamboats at all seasons of the year and facilities for a large commerce, particularly in the article of coal, of which there is now transported in a single day as much as was before the construction of the company's works transported in an entire year.

Answer. The court finds the facts to be as follows, namely: Prior to the construction of said company's works—that is to say, prior to the year 1841—the navigation of the Monongahela river was conducted altogether in small vessels, including small steamboats of not exceeding a tonnage of fifty tons, which could not ascend the river at all seasons of the year, but only during limited periods of the year, depending on the rises in the river. The trade or commerce on said river prior to its improvement by said company's works was small, particularly in the article of coal, for which the river in its natural condition did not furnish sufficient harbors or places of shipment at all seasons of the year; but by the construction and maintenance of the said company's works there has been created an existing navigation for large steamboats at all seasons of the year and facilities for a large commerce, particularly in the article of coal, of which there is now transported in a single day as much as was before the construction of the company's works transported in an entire year.

Fourth. That "lock and dam No. 7" was constructed under and by virtue of the power granted by the act of March 31st, 1836, and its supplements, and particularly in pursuance of the act of assembly of the State of Pennsylvania approved April 8th, 1857, which was in the following terms:

"Further supplement to the act incorporating the Monongahela Navigation Company, approved March 31, eighteen hundred and thirty-six.

SECTION 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,

99 That whenever the construction of sufficient locks and dams to extend the slack water on the Monongahela river from the Pennsylvania State line to Morgantown, in Monongalia county, Virginia, shall have been commenced it shall be the duty of the Monongahela Navigation Company to commence the construction of lock and dam number seven in such manner and on such plan as will extend the navigation from its present terminus to the Virginia State line and complete the same simultaneously with the completion of the work extending to Morgantown; that so much of all acts heretofore passed as have reference to the time of comple-

tion of said improvement to the Virginia State line be, and the same are hereby, repealed."

Answer. The court so finds.

Fifth. That the following correspondence took place between the president of the Monongahela Navigation Company and Col. Wm. E. Merrill, who had charge, as engineer, of the public works of the United States of the Rivers Monongahela, Allegheny, and Ohio:

"U. S. ENGINEER'S OFFICE, No. 82 WEST THIRD ST.,
CINCINNATI, OHIO, *November 6th*, 1878.

To the president and directors of the Monongahela Navigation Company, Pittsburgh, Pa.

GENTLEMEN: Understanding it to be your desire that the United States should build a lock and dam on the Monongahela, at or near the mouth of Dunkard's creek, in the State of Pennsylvania, and, consequently, upon a portion of the river where your company hold exclusive privileges by virtue of various acts of the legislature of said State, I would therefore respectfully request that you execute and forward to this office such legal documents pertinent to
100 the case as will transfer to the U. S. whatever rights your company may have to build a lock and dam in the above-named vicinity. I would also request a formal agreement from your company to begin work on your own lock and dam No. 7 as soon as the United States shall begin work on the lock and dam in the vicinity of Dunkard's creek.

Respectfully, your obedient servant,

WM. E. MERRILL,
Major Engineers & B'v't Col."

OFFICE OF MONONGAHELA NAV. CO.,
PITTSBURGH, *Nov. 15th*, 1878.

Col. Wm. E. Merrill, major of engineers & b'v't col.

DEAR SIR: Yours of the 6th inst. was received the day after the last meeting of our board. At the next meeting, Dec. 4, I will lay it before them and give you an official reply. I have, however, consulted our solicitor and several members of the board, and have no hesitation in assuring you we will execute a release, transfer, or quitclaim to the U. S. of all rights granted to us by the State of Penna., so far as said rights and obligations apply to that portion of the river above the mouth of Dunkard creek or such point as the Government may select in that vicinity, provided the Gov't will proceed to construct a slack-water navigation from said point to the West Virginia State line and thence to Morgantown, W. Va. We will also, if desired by the U. S., extend*ed* our release downward to the mouth of Jacob's creek, where our company have located lock and dam No. 7. We will also enter into an agreement with the U. S., if they desire it, that, upon there being sufficient appropriations made by Congress to secure the completion of a lock and dam in the vicinity of Dunkard creek, and said work having been definitely located and commenced, *that* we will construct and complete

our lock and dam No. 7, so that the navigation can be opened
101 simultaneous on both. If you have any peculiar form or style with regard to these papers, please send me such suggestions as you may think proper, so that I may have them before our next meeting.

Respectfully yours, J. K. MOORHEAD,
Pres't Mon. Nav. Co.

"U. S. ENGINEER OFFICE, No. 82 WEST THIRD ST.,
CINCINNATI, OHIO, *November 25th*, 1878.

Gen. J. K. Moorhead, Pittsburgh, Pa.

GENTLEMEN: I did not reply to your last letter, as I expected to see you in Pittsburgh. I called at your office at about half past nine on Tuesday, the 19th, but you were not in. I went up the Monongahela that afternoon, but on my return I again tried to see you, and Gen. Sweitzer has probably already told you why I failed. You ask if there is any special form of transfer of rights over the Monongahela that I desire shall be used. I know of no special form, but I suppose that whatever document your attorney will prepare will be satisfactory. All I want is full right to build No. 8 whenever we may choose in the vicinity of Dunkard creek. I desire that your company will promise to raise the level of pool No. 7 to a height of 10 ft. above the present surface of pool No. 6. It is immaterial whether you lower No. 6 or not, provided you make the dead low water of your new pool 10 ft. above the present low water of No. 6. If I am assured on that point, I can locate No. 8 intelligently and so as to secure a 6-foot navigation over its lower water site. I find on further examination that the sites are
102 less favorable than I had anticipated. I regret to state that work on the Monongahela has been stopped by high water and will not be resumed this season.

Respectfully, your obedient servant,
WM. E. MERRILL,
Maj. Engineer- & Bvt. Col."

U. S. ENGINEER OFFICE, CUSTOM-HOUSE,
CINCINNATI, O., *March* 24, 1881.

Hon. J. K. Moorhead, president Mon. Nav. Co., Pittsburgh, Pa.

SIR: The last river and harbor bill contains the following appropriation:

"Improving Monongahela river, West Virginia and Pennsylvania, $25,000; but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven at Jacob's creek and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

You will therefore see that my work on number eight is wholly dependent on your work on number seven.

I have therefore to urge on your company that you will, at the

earliest date possible, "undertake in good faith building of lock and dam number seven," and that you will give the Secretary of War satisfactory assurance of your ability and purpose to complete it.

I would therefore suggest that it might be useful for your secretary to communicate at once to the Secretary of War such facts as to the financial resources of the company and its intentions about number seven as will satisfy him on the points specially left to his discretion and unlock the appropriation, so that it may be used this summer.

103 Respectfully, your obedient servant,

WM. E. MERRILL,
Maj. Eng'rs & Bvt. Col.

That on the 3rd day of March, 1881, U. S. Statutes-at-Large, vol. 21, page 471, an act of Congress was passed and approved which was in the following words:

"Improving Monongahela river, West Virginia and Pennsylvania, $25,000; but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven, at Jacob's creek, and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

That after the foregoing correspondence the Monongahela Navigation Company took action, as shown by the minute of the proceedings of their board of date April 6, 1881, as follows:

"The president also referred to letter received from Col. Merrill, and, after the reading of the letter, the following resolutions were offered:

"Whereas Congress has made an appropriation for the commencement of the building of lock and dam number eight, in the Monongahela river, the payment of which appropriation is made to depend upon the Secretary of War being satisfied of the *bona fide* intention of this company to construct lock and dam number seven and of their financial ability to complete the same; and

"Whereas Col. Merrill, of the U. S. engineers, in charge of the Government improvement of the Monongahela river, has requested this company to furnish the Secretary of War with satisfactory assurances in relation thereto: Therefore—

"Resolved, That it is the *bona fide* purpose and intention of this company to construct lock and dam number seven, in the Monongahela river, in the manner and at the time required of them by the acts of assembly of the State of Pennsylvania—that is to say, so to complete said lock and dam number seven that the
104 same shall be ready for use as soon as the requisite locks and dams above lock and dam number seven constructed or about to be constructed by the Federal Government shall also be finished and ready for use, so as to complete the slack water of said river from Pittsburgh, Pennsylvania, to Morgantown, Virginia.

"Resolved, That the secretary of this company be directed to

forward a copy of the foregoing resolution, together with copies of the company's annual report showing the intention of the company and their ability to complete this work, to Col. Merrill, and also to the Secretary of War."

That notice of this action of the company was given to the Secretary of War by the secretary of the company, and that subsequently the following letter was received from Col. Merrill:

U. S. ENGINEER'- OFFICE, CUSTOM-HOUSE,
CINCINNATI, O., *May* 4, 1881.

Gen. J. K. Moorhead, pres. Monongahela Navigation Co., Pittsburgh, Pa.

SIR: I have just received official notice from the Secretary of War, through the chief of engineers, that the resolution and documents relative to the construction of lock and dam No. 7, on the Monongahela river, forwarded to this office by your company in April last (duplicates sent to the honorable Secretary of War), have been considered as fully meeting the requirements of the proviso in the last appropriation for the improvement of the above-named river prohibiting the expenditure of the money appropriate- "until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven, at Jacob's creek, and until said company shall, in a manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

105 I have been officially directed to notify your company of this decision of the Secretary of War.

The only obstacle now remaining to prevent immediate work at the mouth of Dunkard is the necessity of waiting until the land is purchased and paid for. This matter is yet in the hands of the attorney general, and I am compelled to await his action.

Respectfully, your obedient servant,

WM. E. MERRILL,
Major of Engineers.

That thereupon the construction of said lock and dam number seven was begun in 1882 and the same was completed in 1884.

Answer. The court finds the facts to be as set forth in the foregoing (5th) request.

And thereupon the Monongahela Navigation Company, by its counsel, requested the court to hold as matter of law:

1st. That the United States do not possess a legal title to the lands and waters lying within the limits of a State nor do they have a right to enter and take possession of a navigable stream within the limits of a State for every and all purposes; that the powers and rights of the United States over navigable rivers within the limits of a State are based on and limited by the duty to promote and aid navigation and commerce between the States; that accordingly it is not within the legitimate powers of Congress to authorize the condemnation and appropriation by the United States of a system

of locks and dams erected by a corporation of a State, in pursuance of powers granted by such State, where such system is efficacious in promoting navigation and where the object of the Federal legislation is not to remove or abate such locks and dams as obstacles to navigation, but to adopt and subject them to the jurisdiction of the United States as means and facilities of interstate commerce; that it is only when the action of the State or its grantees in erecting works in navigable streams is deemed to encroach upon the navigation of such streams as means of interstate and foreign commerce that Congress may interfere and control and supersede it.

106 To which request the court made answer as follows:

"*Per curiam.* This request is refused."

And to said answer of the court the Monongahela Navigation Company excepts, and at its instance the court signs and seals this its bill of exception.

M. W. ACHESON, *Judge.* [SEAL.]

2. And the said Monongahela Navigation Company, by its counsel, also requested the court to hold as matter of law—

"That in estimating the damages to which the owners of a system of locks and dams built under authority of law for the promotion of navigation are legally entitled in case of condemnation in order to make such system free for the use of navigators, the earning power and value of the tolls which such owners are authorized to collect and do collect constitute a material element or item; that hence that provision of the act of Congress under which these proceedings are had, being act of 1888, Statutes at Large, vol. 25, page 411, prescribing that 'in estimating the sum to be paid by the United States the franchise of the Monongahela Navigation Company to collect tolls shall not be considered or estimated,' is void and of no effect, first, because such provision is an attempt by the legislative power to dictate to the court in its exercise of a judicial function what shall and what shall not be considered the items and elements of the damages to which the navigation company is entitled; and, secondly, because such provision of said act of Congress disregards and is in derogation of the Constitution of the United States wherein it provides that private property shall not be taken for public use without just compensation."

To which request the court made answer as follows:

"*Per curiam.* This request is refused."

107 And to said answer of the court the Monongahela Navigation Company excepts, and at its instance the court signs and seals this its second bill of exceptions.

M. W. ACHESON, *Judge.* [SEAL.]

3. And the said Monongahela Navigation Company, by its counsel, also requested the court to hold as matter of law:

"That the said act of Congress under which these proceedings are had is unconstitutional and void."

To which request the court made answer as follows:

"*Per curiam.* This request is refused."

And to said answer of the court the Monongahela Navigation Company excepts, and at its instance the court signs and seals this its third bill of exceptions.

M. W. ACHESON, *Judge.* [SEAL.]

4. During the trial of the cause the Monongahela Navigation Company, by its counsel, called William Bakewell as a witness on behalf of said company and offered to prove by him and other witnesses—

"That the paid-up capital stock of the Monongahela Navigation Company consists of thirty-two thousand six hundred and thirty-nine shares of fifty dollars; that dividends have been declared on the stock for a number of years at the rate of twelve per cent. per annum.

"That the tolls received by the said company for the use of its works, including lock and dam No. 7, have averaged for several years past not less than $240,000.00; that the market value of the stock was at the time of the inception of these proceedings about $100 per share; that the money value of their entire works and franchise is not less than $4,000,000; that the actual toll receipts of lock and dam No. 7 for several years past have exceeded $2,800 per annum, and that a very large increase of such toll receipts at lock and dam No. 7 will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam.

108 "That by the construction and maintenance of the company's works a permanent and reliable public highway has been created on which a large and increasing carriage of coal and general merchandise takes place, and that permanent navigation for the largest vessel and steamboat now exists from the city of Pittsburgh, Pa., to or near the line between the States of Pennsylvania and West Virginia.

"That in view of the present and prospective tolls receivable at lock and dam No. 7 the present value of said lock and dam No. 7 is not less than $450,000.00, said value being predicated upon said present and prospective tolls; that said lock and dam No. 7 are a portion of said company's works, which consist of seven dams, each furnished with a lock or locks.

"That the navigation which is sought by these proceedings to be made free was mainly created and made possible at all seasons by the construction and maintenance of the company's works.

"That a large portion of the tolls received by the company is charged upon merchandise and articles carried between points of shipment and delivery entirely within the State of Pennsylvania, and constituting internal commerce of said State, and that a portion of the tolls collectable at lock and dam No. 7, for the use of said lock and dam, is chargeable for merchandise, goods, and passengers carried between points of shipment and delivery in the State of Pennsylvania, the transportation being wholly within the State as to said portion."

To which offer of testimony counsel for the United States objected

for the reason that the same was incompetent and irrelevant; whereupon the court sustained the objection and rejected the evidence; to which ruling of the court the Monongahela Navigation Company excepts, and at its instance this its fourth bill of exceptions is signed and sealed by the court.

M. W. ACHESON, *Judge.* [SEAL.]

5. Subsequently to the trial of the above cause the court found and made the following finding:

"In pursuance of written stipulation this case was tried by
109 the court without the intervention of a jury; and therefore, now, this 24th day of December, 1890, on due consideration, the court finds the value of said lock and dam number seven, otherwise known as "the upper lock and dam," and its appurtenances, of the Monongahela Navigation Company, to be two hundred and nine thousand dollars ($209,000), not considering or estimating in this valuation the franchise of said company to collect tolls; which sum of two hundred and nine thousand dollars ($209,000) the court fixes and determines as the amount to be paid by the United States to the said Monongahela Navigation Company for the said lock and dam No. 7 and its appurtenances.

"And let judgment be entered upon the foregoing finding at the end of four days, unless in the meantime a motion for a new trial should be entered *sec. reg.*

"BY THE COURT."

And thereupon judgment was entered as directed by the court in words following, to wit:

"And now, to wit, December 31, 1890, judgment is hereby entered upon the findings of the court for the sum of $209,000."

To which entry of judgment the Monongahela Navigation Company excepts, and at its instance and request the court signs and seals this its fifth bill of exceptions.

M. W. ACHESON, *Judge.* [SEAL.]

110 *Petition for Appeal and Order Thereon.*

Circuit Court of the United States, Western District of Pennsylvania.

In Re Proceedings on Behalf of the United States to Condemn and Appropriate to Public Use Lock and Dam No. 7 of the Monongahela Navigation Company.

To the honorable the Supreme Court of the United States:

The petition of the Monongahela Navigation Company respectfully showeth that on the 31st day of March, 1890, your petitioner filed its statement and declaration appealing from the award of viewers appointed by the circuit court of the United States for the western district of Pennsylvania to condemn and appropriate to public use lock and dam No. 7 of the Monongahela Navigation Company; that on the same day the United States filed its plea thereto; whereupon the cause was brought to trial, and on the 31st

day of December, 1890, judgment was entered therein, as by reference to the record in said proceedings will more fully and at large appear; which said judgment your petitioner is advised is erroneous and ought to be reversed.

Wherefore your petitioner prays that the record in the said cause be sent to the Supreme Court of the United States, and that the said judgment of the said circuit court may be reversed and corrected, and such other order and judgment made as to the said Supreme Court shall seem just.

MONONGAHELA NAVIGATION COMPANY,
By GEO. SHIRAS, JR.,
JOHNS McCLEAVE,
THOS. D. CARNAHAN, *Solicitors.*

And now, to wit, April 8th, 1891, appeal allowed.

J. H. REED, *Judge.*

Filed April 8, 1891.

H. D. GAMBLE, *Clerk.*

111 In the Circuit Court of the United States for the Western District of Pennsylvania.

In the Matter of the Proceedings on Behalf of the United States to Condemn and Appropriate to Public Use Lock and Dam No. 7 of the Monongahela Navigation Company.	No. 10. May Term, 1890.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case so full and entire as the same remains of record and on file in my office.

Seal of the U. S. Circuit Court, W. D. Penna.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 18th day of April, A. D. 1891.

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, James H. Reed, judge holding the United States circuit court for said district, do hereby certify that H. D. Gamble above named was at the time of making the above certificate and is now clerk of the said court, and that the said certificate made by him is in due form of law.

Pittsburgh, April 18th, 1891.

J. H. REED,
Judge Holding U. S. Circuit Court.

111½ *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, in the matter of the proceedings of the United States to condemn & appropriate to public use dam & lock No. 7 of the Monongahela Navigation Company, a manifest error hath happened, to the great damage of the said Monongahela Navigation Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you sent the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 4th day of May next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the U. S. Circuit Court, W. D. Penna.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of April, A. D. 1891.

H. D. GAMBLE,
Clerk U. S. Circuit Court.

Allowed by—
J. H. REED, *Judge.*

[Endorsed:] Writ of error.

112 *Citation.*

UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } *sct:*

To Walter Lyon, United States attorney for the western district of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 4th day of May next, pursuant to a writ of error and an appeal filed in the clerk's office of the United States circuit court in the matter of the proceedings on behalf of the United States to condemn and appropriate to public use lock and dam No. 7 of the Monongahela Navigation Company, on behalf of the said Monon-

gahela Navigation Company, to show cause, if any there be, why the judgment rendered in the said proceeding, as in the said writ of error and appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 8th day of April, A. D. 1891.

J. H. REED, *Judge.*

Attest: H. D. GAMBLE, *Clerk.*

[Seal of the U. S. Circuit Court, W. D. Penna.]

April 9, 1891.—Service accepted.

WALTER LYON.

[Endorsed:] Citation.

113 In the Supreme Court of the United States.

In Re Proceedings on Behalf of the United States to Condemn and Appropriate to Public Use Lock & Dam No. 7 of the Monongahela Navigation Company.

Writ of error by the Monongahela Navigation Company from the judgment of the circuit court of the United States for the western district of Pennsylvania, in the third circuit.

Assignments of Error.

The Monongahela Navigation Company, by its counsel, comes and assigns the following errors on the record of the proceedings below:

The learned court erred:

First. In refusing to hold as requested in the first prayer of the Monongahela Navigation Company; which prayer is as follows:

That the United States do not possess a legal title to the lands and waters lying within the limit of a State, nor do they have a right
114 to enter and take possession of a navigable stream within the limits of a State for every and all purposes; that the powers and rights of the United States over navigable rivers within the limits of a State are based on and limited by the duty to promote and aid navigation and commerce between the States; that accordingly it is not within the legitimate powers of Congress to authorize the condemnation and appropriation by the United States of a system of locks and dams erected by a corporation of a State in pursuance of powers granted by such State where such system is efficacious in promoting navigation and where the object of the Federal legislation is not to remove or abate such locks and dams as obsticles to navigation, but to adopt and subject them to the jurisdiction of the United States as means and facilities of interstate commerce; that it is only when the action of the State or its grantees in erecting works in navigable streams is deemed to encroach upon the navigation of such streams

as means of interstate and foreign commerce that Congress may interfere and control and supersede it.

To which the court answered: "This request is refused."

Second. In refusing to hold as requested in the second prayer of the Monongahela Navigation Company; which prayer is as follows:

"That in estimating the damages to which the owners of a system of locks and dams, built under authority of law for the pro-
115 motion of navigation, are legally entitled in case of condemnation in order to make such system free for the use of navigators the earning power and value of the tolls which such owners are authorized to collect and do collect constitute a material element or item; that hence that provision of the act of Congress under which these proceedings are had, being act of 1888, Statutes at Large, vol. 25, page 411, prescribing that 'in estimating the sum to be paid by the United States the franchise of the Monongahela Navigation Company to collect tolls shall not be considered or estimated,' is void and of no effect, first, because such provision is an attempt by the legislative power to dictate to the court, in its exercise of a judicial function, what shall and what shall not be considered the items and elements of the damages to which the navigation company is entitled; and, secondly, because such provision of said act of Congress disregards and is in derogation of the Constitution of the United States wherein it provides that private property shall not be taken for public use without just compensation."

To which the court answered: "This request is refused."

Third. In refusing to hold as requested in the third prayer of the Monongahela Navigation Company; which prayer is as follows:

"That the said act of Congress under which these proceedings are had is unconstitutional and void."

To which the court answered: "This request is refused."

116 Fourth. In sustaining the objection to and excluding the evidence as offered by the Monongahela Navigation Company as set fourth in the fourth bill of exceptions; which offer of evidence and objection is as follows:

"The Monongahela Navigation Company, by its counsel, called William Bakewell as a witness on its behalf and offered to prove by him and other witnesses—

That the paid-up capital stock of the Monongahela Navigation Company consists of thirty-two thousand six hundred and thirty-nine shares of fifty dollars; that dividends have been declared on the stock for a number of years at the rate of twelve per cent. per annum.

That the tolls received by the said company for the use of its works, including lock and dam No. 7, have averaged for several years past not less than $240,000.00; that the market value of the stock was at the time of the inception of these proceedings about $100 per share; that the money value of their entire works and franchises is not less than $4,000,000; that the actual toll receipts of lock and dam No. 7 for several years past have exceeded $2,800 per annum, and that a very large increase of such toll receipts at

lock and dam No. 7 will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam.

That by the construction and maintenance of the company's works a permanent and reliable public highway has been created on which large and increasing carriage of coal and general
117 merchandise takes place, and that permanent navigation for the largest vessel- and steamboats now exists from the city of Pittsburgh, Pa., to or near the line between the States of Pennsylvania and West Virginia.

"That in view of the present and prospective tolls receivable at lock and dam No. 7 the present value of said lock and dam No. 7 is not less than $450,000.00, said value being predicated upon said present and prospective tolls; that said lock and dam No. 7 are a portion of said company's works, which consist of seven dams, each furnished with a lock or locks.

"That the navigation which is sought by these proceedings to be made free was mainly created and made possible at all seasons by the construction and maintenance of the company's works.

"That a large portion of the tolls received by the company is charged upon merchandise and articles carried between points of shipment and delivery entirely within the State of Pennsylvania and constituting internal commerce of said State, and that a portion of the tolls collectable at lock and dam No. 7 for the use of said lock and dam is chargeable for merchandise, goods, and passengers carried between points of shipment and delivery in the State of Pennsylvania, the transportation being wholly within the State as to said portion."

118 To which offer of testimony counsel for the United States objected for the reason that the same was incompetent and irrelevant; whereupon the court sustained the objection and rejected the evidence.

Fifth. In making the finding upon the evidence in the cause and entering judgment as set forth in the fifth bill of exceptions; which finding and judgment are as follows:

"In pursuance of written stipulation this case was tried by the court without the intervention of a jury; and therefore, now, this 24th day of December, 1890, on due consideration, the court finds the value of said lock and dam number seven, otherwise known as 'the upper lock and dam,' and its appurtenances of the Monongahela Navigation Company to be two hundred and nine thousand dollars ($209,000), not considering or estimating in this valuation the franchise of said company to collect tolls, which sum of two hundred and nine thousand dollars ($209,000) the court fixes and determines as the amount to be paid by the United States to the said Monongahela Navigation Company for the said lock and dam No. 7 and its appurtenances.

"And let judgment be entered upon *for* the -going finding at the end of four days unless in the meantime a motion for a new trial should be entered *sec. reg.*

BY THE COURT."

And thereupon judgment was entered as directed by the court in words following, to wit:

119 "And now, to wit, December 31, 1890, judgment is hereby entered upon the findings of the court for the sum of $209,000."

GEO. SHIRAS, JR.,
JOHNS McCLEAVE,
THOS. D. CARNAHAN,
Att'ys for Monongahela Navigation Company.

120 In the Supreme Court of the United States, —— Term, 1891.

MONONGAHELA NAVIGATION COMPANY
vs.
UNITED STATES.
} No. —.

Appeal by the Monongahela Navigation Company from the judgment of the circuit court of the United States of the western district of Pennsylvania, of the third circuit.

Assignments of Error.

The Monongahela Navigation Company, by its counsel, comes and assigns the following errors on the record of the proceedings below:

The learned court erred—

First. In refusing to hold as requested in the first prayer of the Monongahela Navigation Company; which prayer is as follows:

That the United States do not possess a legal title to the lands and waters lying within the limits of a State, nor do they have
121 a right to enter and take possession of a navigable stream within the limits of a State for every and all purposes; that the powers and rights of the United States over navigable rivers within the limits of a State are based on and limited by the duty to promote and aid navigation and commerce between the States; that accordingly it is not within the legitimate powers of Congress to authorize the condemnation and appropriation by the United States of a system of locks and dams erected by a corporation of a State, in pursuance of powers granted by such State, where such system is efficacious in promoting navigation and where the object of the Federal legislation is not to remove or abate such locks and dams as obstacles to navigation, but to adopt and subject them to the jurisdiction of the United States as means and facilities of interstate commerce; that it is only when the action of the State or its grantees in erecting works in navigable streams is deemed to encroach upon the navigation of such streams as means of interstate and foreign commerce that Congress may interfere and control and supersede it.

To which the court answered, "This request is refused."

Second. In refusing to hold as requested in the second prayer of the Monongahela Navigation Company; which prayer is as follows:

"That in estimating the damages to which the owners of a system of locks and dams built under authority of law for the pro-
122 motion of navigation are legally entitled in case of condemnation in order to make such system free for the use of navigators, the earning power and value of the tolls which such owners are authorized to collect and do collect constitute a material element or item; that hence that provision of the act of Congress under which these proceedings are had, being act of 1888, Statutes at Large, vol. 25, page 411, prescribing that 'in estimating the sum to be paid by the United States the franchise of the Monongahela Navigation Company to collect tolls shall not be considered or estimated,' is void and of no effect, first, because such provision is an attempt by the legislative power to dictate to the court, in its exercise of a judicial function, what shall and what shall not be considered the items and elements of the damages to which the navigation company is entitled; and, secondly, because such provision of said act of Congress disregards and is in derogation of the Constitution of the United States, wherein it provides that private property shall not be taken for public use without just compensation;" to which the court answered, "This request is refused."

Third. In refusing to hold as requested in the third prayer of the Monongahela Navigation Company; which prayer is as follows:

"That the said act of Congress under which these proceedings are had is unconstitutional and void;" to which the court answered, "This request is refused."

123 Fourth. In sustaining the objection to and excluding the evidence as offered by the Monongahela Navigation Company, as set forth in the fourth bill of exceptions; which offer of evidence and objection is as follows:

"The Monongahela Navigation Company, by its counsel, called William Bakewell as a witness on its own behalf and offered to prove by him and other witnesses—

"That the paid-up capital stock of the Monongahela Navigation Company consists of thirty-two thousand six hundred and thirty-nine shares of fifty dollars; that dividends have been declared on the stock for a number of years at the rate of twelve per cent. per annum.

"That the tolls received by the said company for the use of its works, including lock and dam No. 7, have averaged for several years past not less than $240,000.00; that the market value of the stock was, at the time of the inception of these proceedings, about $100 per share; that the money value of their entire works and franchises is not less than $4,000,000; that the actual toll receipts of lock and dam No. 7 for several years past have exceeded $2,800 per annum, and that a very large increase of such toll receipts at lock and dam

No. 7 will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam.

"That by the construction and maintenance of the company's works a permanent and reliable public highway has been created on which large and increasing carriage of coal and general
124 merchandise takes place, and that permanent navigation for the largest vessel- and steamboats now exists from the city of Pittsburgh, Pa., to or near the line between the States of Pennsylvania and West Virginia.

"That in view of the present and prospective tolls receivable at lock and dam No. 7 the present value of said lock and dam No. 7 is not less than $450,000.00, said value being predicated upon said present and prospective tolls; that said lock and dam No. 7 are a portion of said company's works, which consist of seven dams, each furnished with a lock or locks.

"That the navigation which is sought by these proceedings to be made free was mainly created and made possible at all seasons by the construction and maintenance of the company's works.

"That a large portion of the tolls received by the company is charged upon merchandise and articles carried between points of shipment and delivery entirely within the State of Pennsylvania and constituting internal commerce of said State, and that a portion of the tolls collectable at lock and dam No. 7 for the use of said lock and dam is chargeable for merchandise, goods, and passengers carried between points of shipment and delivery in the State of Pennsylvania, the transportation being wholly within the State as to said portion."

125 To which offer of testimony counsel for the United States objected for the reason that the same was incompetent and irrelevant; whereupon the court sustained the objection and rejected the evidence.

Fifth. In making the finding upon the evidence in the cause and entering judgment as set forth in the fifth bill of exceptions; which finding and judgment are as follows:

"In pursuance of written stipulation this case was tried by the court without the intervention of a jury, and therefore, now, this 24th day of December, 1890, on due consideration, the court finds the value of said lock and dam number seven, otherwise known as "the upper lock and dam," and its appurtenances of the Monongahela Navigation Company to be two hundred and nine thousand dollars ($209,000), not considering or estimating in this valuation the franchise of said company to collect tolls; which sum of two hundred and nine thousand dollars ($209,000) the court fixes and determines as the amount to be paid by the United States to the said Monongahela Navigation Company for the said lock and dam No. 7 and its appurtenances.

"And let judgment be entered upon *for* the -going finding at the end of four days, unless in the meantime a motion for a new trial should be entered *sec. reg.*

"BY THE COURT."

And thereupon judgment was entered, as directed by the court, in words following, to wit:

126 "And now, to wit, December 31, 1890, judgment is hereby entered upon the findings of the court for the sum of $209,000."

GEO. SHIRAS, JR.,
JOHNS McCLEAVE,
THOS. D. CARNAHAN,
Att'ys for Monongahela Navigation Company.

Endorsed on cover: Case No. 14,589. W. Pennsylvania C. C. U. S. No. 1122. The Monongahela Navigation Company, appellant and plaintiff in error, *vs.* The United States. Filed April 24, 1891.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE MONONGAHELA NAVIGATION Company, appellant and plaintiff in error, vs. THE UNITED STATES. } No. 1122.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE MONONGAHELA NAVIGATION Company, appellant and plaintiff in error, *vs.* THE UNITED STATES. } No. 1122.

MOTION TO ADVANCE.

And now, March 21, 1892, comes the Attorney-General, and moves the court to advance the above-entitled case for an early hearing at the October term, 1892.

Legislation has been enacted looking to the purchase by the Government of seven locks and dams belonging to the Monongahela Navigation Company, on the Monongahela River, with the purpose of freeing the commerce on that river from the present heavy tolls. Lock and dam No. 7 have been condemned under an act of Congress providing that no compensation should be allowed to the navigation company on account of its claim for franchises. The circuit court for the western district of Pennsylvania

held that this was proper legislation, and awarded the sum of $209,000 to the Monongahela Navigation Company for the lock and dam condemned. An appeal was taken by the company to the Supreme Court, which presents the question above suggested, and is the case as above entitled. It is very essential that the validity of the condemnation of lock and dam No. 7 be determined by this court, in order that the plan of Congress to condemn all the locks and dams shall be carried out, and that the proper course be taken in the six condemnation proceedings yet to be had.

I append a copy of a resolution adopted by the Committee on Rivers and Harbors of the House of Representatives of the Fifty-second Congress, requesting me to make this motion.

W. H. H. MILLER,
Attorney-General.

Whereas the Fiftieth Congress made an appropriation in the river and harbor bill for the purchase from the Monongahela Navigation Company of lock and dam No. 7, and directed that in case the Secretary of War should fail to purchase said lock and dam No. 7 for the amount appropriated, that proceedings should be begun in the United States circuit court for the western district of Pennsylvania for its condemnation; provided, however, that no compensation should be allowed the said navigation company on account of its claim of franchises; and

Whereas on failure to purchase said lock and dam the said Secretary of War did in-titute proceedings in said court for the condemnation of said lock and dam, which proceedings were concluded in said court, awarding some $209,000 to the Monongahela Navigation Company, and

an appeal was taken to the Supreme Court of the United States by said navigation company, where said appeal is now pending; and

Whereas the Fifty-first Congress did insert a similar appropriation for the purchase, and on failure to purchase, for the condemnation of lock and dam No. 6, providing, however, that proceedings for the condemnation of said lock and dam No. 6 should not begin until the final decision in case of lock and dam No. 7 no v pending in the Supreme Court of the United States; and

Whereas the Commitee on Rivers and Harbors deem it advisable and of great public interest that the seven (7) locks and dams belonging to the Monongahela Navigation Company should be made free, as the tolls which have to be paid on the immense quantities of coal going out of said river are a burden not only to the producers of coal, but to the many consumers on the Ohio and Mississippi rivers; and

Whereas the said River and Harbor Committee are uncertain how to proceed because of the fact that the question of the right to franchises on the part of the Monongahela Navigation Company is yet undetermined: Therefore be it

Resolved by the Committee on Rivers and Harbors of the Fifty-second Congress, That the Attorney-General of the United States is respectfully asked to present a request to the Supreme Court of the United States asking that the said case now pending in said court on its appeal from the circuit court of western district of Pennsylvania for the condemnation of lock and dam No. 7 on the Monongahela River be advanced and heard as soon as possible, so that this committee may know whether the course heretofore pursued is correct, and may be advised how to treat the said remaining locks and dams in order to make the Monongahela River free.

○

148 US 312

Office Supreme Court U. S.
FILED.
OCT 10 1892
JAMES H. McKENNEY,
CLERK.

RECORD, CASE No. 14,589.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. 1122.

The Monongahela Navigation Company, Appellant and Plaintiff in Error.

vs.

THE UNITED STATES.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

APPELLANT'S BRIEF.

WAYNE MacVEAGH,
THOMAS. D. CARNAHAN,
JOHNS McCLEAVE.

Attorneys for Navigation Company.

MYERS, SHIELDS & CO., PRINTERS, PITTSBURGH.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 1122, OCTOBER TERM, 1891.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

MONONGAHELA NAVIGATION CO.

APPELLANT AND PLAINTIFF IN ERROR

VS.

THE UNITED STATES.

STATEMENT.

This case comes here upon appeal from and writ of error to the judgment of the Circuit Court below, determining the compensation to be paid the Monongahela Navigation Company for the appropriation by the United States of Lock and Dam No. 7, in the Monongahela River, the property of the Navigation Company.

The proceedings below originated under an Act of Congress passed the 31st day of July, 1888, (U. S.

Statutes, Vol. 25, page 411). The Act referred to authorized the Secretary of War to negotiate with the Monongahela Navigation Company for the purchase of Lock and Dam No. 7, otherwise known as the Upper Lock and Dam, for a sum not to exceed $161,733.13, and directed that, if the Secretary of War could not purchase the said property for such sum, or a less sum, he should then institute proceedings for the condemnation of the property, in the form and manner prescribed by the provisions of the general railroad law of Pennsylvania, approved February 19th, 1849, and provided that, in estimating the sum to be paid by the United States, the franchise of the Navigation Company to collect tolls should not be considered or estimated; and that when the Lock and Dam No. 7 should be acquired, by purchase or by condemnation, the Secretary of War should take charge thereof and the same should thereafter be subject to the provisions of Section 4 of an Act of Congress entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers, and harbors, and for other purposes," approved July 5th, 1884.

Acting under the instructions of the Secretary of War, the District Attorney of the United States, in accordance with the form prescribed by the general railroad law of Pennsylvania, applied to the Circuit Court of the United States for the appointment of Viewers to view the Lock and Dam proposed to be taken, and assess the compensation to be paid the Navigation Company therefor, not estimating or considering in fixing such compensation the franchise of the Navigation Company to collect tolls. The Petition for the appointment of Viewers will be found on pages 2 to 5 of the printed record.

Upon such application Viewers were appointed, who subsequently reported to the Circuit Court that they found the value of said Lock and Dam No. 7, and its appurtenances, to be $209,393.52, not estimating or considering the franchise of the Company to collect tolls, as directed by the Act of Congress referred to. The Report of the Viewers will be found printed on pages 13 and 14 of the record.

From this award of the Viewers, the United States appealed, which appeal, according to the practice under the State law referred to, gave the right to each party of a trial *de novo*, by jury according to the course of the common law; the Navigation Company being Plaintiff in such action, and the United States the Defendant.

The declaration of the Navigation Company, made on such appeal, will be found printed on page 16 of the record, to which the United States pleaded "Not Guilty."

By agreement of the parties, a trial by jury was waived and the determination of the issues joined submitted to the Court without the intervention of a jury.

The contention in the trial of the case in the Court below was principally as to the validity of the Act of Congress, under which the proceedings were instituted, by reason of the provision in said Act specifically directing that the earning power of the Lock and Dam, under the franchises of the Navigation Company, should not be considered in estimating its value, or the compensation to be paid the Navigation Company for the appropriation of it to public use. About this singular and unprecedented provision the chief controversy has been made.

The Monongahela river rises in the mountains of West Virginia, flows northwardly through Pennsylvania to Pittsburgh, where it forms a junction with the Allegheny and Ohio rivers.

The Monongahela Navigation Company is a corporation of the State of Pennsylvania, created by an Act of the General Assembly of said State, approved March 31st, 1836, and numerous supplements, for the purpose of constructing and maintaining an artificial navigation of the Monongahela river by means of locks and dams within the limits of the State of Pennsylvania, and with the right to collect tolls for the use of said locks and dams. The charter of the Company will be found at pages 27 to 61 of printed record.

The State of Pennsylvania subscribed $125,000.00 to the capital of the Company. (Acts of April 14, 1838 and June 11, 1840. Printed Record, (pages 37 and 40.)

In pursuance of its charter the Navigation Company, between 1841 and the present time, has constructed in said river seven locks and dams, which together now carry the slack water navigation as far as the West Virginia State line.

Prior to the construction of said Company's works, that is to say, prior to the year 1841, the navigation of the Monongahela river was conducted altogether in small vessels, including small steamboats of not exceeding a tonage of fifty tons, which could not ascend the river at all seasons of the year, but only during limited periods of the year, depending on the rises in the river. The trade or commerce on said river, prior to its improvment by said Company's

works, was small, particularly in the article of coal, for which the river in its natural condition did not furnish sufficient harbors or places of shipment at all seasons of the year; but by the construction and maintenance of said Company's works there has been created an existing navigation for large steamboats at all seasons of the year, and facilities for a large commerce, particularly in the article of coal, of which there is now transported in a single day as much as was before the construction of the Company's works transported in an entire year. (See finding of the Court, printed record, page 67.)

The construction of the Lock and Dam No. 7, the property attempted to be appropriated in this proceeding, by the Monongahela Navigation Company, was begun in the year 1882 and completed in 1884, being the last one built, and completing the Company's improvements in the State of Pennsylvania.

The work was commenced under the following circumstances:

It was provided by an Act of the Legislature of Pennsylvania, constituting a Supplement to the Company's Charter, approved April 8th, 1857, that when ever the construction of sufficient locks and dams to extend the slack water on the Monongahela river from the Pennsylvania State line to Morgantown, in Virginia, shall have been commenced, it shall be the duty of the Monongahela Navigation Company to commence the construction of Lock and Dam No. 7 in such manner and on such plan as will extend the navigation from its present terminus to the Virginia State line, and complete the same simultaneously with the completion of the work extending to Morgantown. (See special findings, printed record, page 67.)

In 1878 Congress contemplated the improvement of the Monongahela river in West Virginia, and some negotiations by correspondence took place between the President of the Navigation Company and Colonel Merrill, United States Engineer, in charge of the Ohio and Monongahela rivers, in the fall of that year. This correspondence will be found on pages 68 and 69 of the printed record.

By the River and Harbor Bill, approved March 3rd, 1881, (U. S. Statutes at Large, Vol. 21, page 471,) Congress appropriated $25,000 for the improvement of the Monongahela river in West Virginia and Pennsylvania. "But this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of Lock and Dam No. 7 at Jacob's Creek, and until said Company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same." (See special finding, printed record, page 65.)

After the passage of this Act by Congress, Colonel Merrill, the Government Engineer in charge, under date of March 24th, 1881, addressed a letter to the President of the Navigation Company, as follows:

"SIR:—The last River and Harbor Bill contains the following appropriation:

"Improving Mononghela river, West Virginia and Pennsylvania, $25,000.; but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of Lock and Dam No. 7 at Jacob's Creek, and until said Company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same.

"You will therefore see that my work on No. 8 is wholly dependent on your work on No. 7. I have therefore to urge on your Company that you will, at the earliest date possible, 'Undertake in good faith building of Lock and Dam No. 7,' and that you will give the Secretary of War satisfactory assurance of your ability and purpose to complete it.

"I would therefore suggest that it might be useful for your Secretary to communicate at once to the Secretary of War such facts as to the financial resources of the Company, and its intentions, about Number Seven, as will satisfy him on the points specially left to his descretion, and unlock the appropriation, so that it may be used this summer."

(Special finding, printed record, pages 69 and 70.)

In response to this communication from Colonel Merrill, the Monongahela Navigation Company took corporate action, as shown by its minutes, as follows:

"*Whereas*, Congress has made an appropriation for the commencement of the building of Lock and Dam No. 8, in the Monongahela river, the payment of which appropriation is made to depend upon the Secretary of War being satisfied of the *bona fide* intention of this Company to construct Lock and Dam No. 7 and of their financial ability to complete the same; and,

"*Whereas*, Colonel Merrill of the U. S. Engineers, in charge of the Government improvement of the Monongahela river has requested this Company to furnish the Secretary of War with satisfactory assurances in relation thereto; therefore,

"*Resolved*, That it is the *bona fide* purpose and intention of this Company to construct Lock and Dam No. 7 in the Monongahela river, in the manner and at the time required of them by the Acts of Assembly of the State of Pennsylvania, that is to say, so to complete said Lock and Dam No. 7 that the same shall be ready for use as soon as the requisite locks and dams above Lock and Dam No. 7, constructed or about to be constructed by the Federal Government, shall also be finished and ready for use, so as to complete the slack water of said river from Pittsburgh, Pennsylvania to Morgantown, Virginia.

"*Resolved*, That the Secretary of this Company be directed to forward a copy of the foregoing resolution, together with copies of the Company's Annual Reports showing the intention of the Company and their ability to complete this work, to Colonel Merrill, and also to the Secretary of War."

(See printed record, pages 70 and 71.)

Notice of this corporate action was communicated to the Secretary of War, and thereafter, under date of May 4th, 1881, Colonel Merrill addressed to the President of the Navigation Company the following letter:

"SIR:—I have just received official notice from the Secretary of War, through the Chief of Engineers, that the resolution and documents relative to the construction of Lock and Dam No. 7, on the Monongahela river, forwarded to this office by your Company, in April last, (duplicate sent to the honorable Secretary of War,) have been considered as fully meeting the requirements of the proviso in the last appropriation for the improvement of the above named river, prohibiting the expenditure of the money appropriated 'until the Monongahela Navigation Company shall

have undertaken in good faith the building of Lock and Dam No. 7 at Jacob's Creek, and until said Company shall, in a manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same.'

"I have been officially directed to notify your Company of this decision of the Secretary of War.

"The only obstacle now remaining to prevent immediate work at the mouth of Dunkard is the necessity of waiting until the land is purchased and paid for. This matter is yet in the hands of the Attorney General, and I am compelled to await his action."

(See printed record, page 71.)

In pursuance of this negotiation and correspondence, the Navigation Company commenced its construction of Lock and Dam No. 7, in 1882, and completed the same in 1884. The Government has since completed Lock and Dam No. 8, extending the slack water navigation to Morgantown.

The object of the present proceeding is to appropriate to the use of the United States, for the same uses and purposes for which it is now held, Lock and Dam No. 7, so constructed by the Navigation Company; and, upon the theory that the company had no lawful right to erect the structure, to pay for it, not the value of the improvement, but only partial value, excluding and disregarding in the estimation of the sum to be paid, the right of the company to collect tolls for the use of said improvement. That is, in estimating its value, it shall not be regarded as a source of revenue at all to the Navigation Company, but merely as an unproductive pile of stones and logs. To show what

a mere fraction of compensation such a method of assessment would produce, we offered to show, at the trial below,

> "that the paid up capital stock of the Monongahela Navigation Company consists of 32,639 shares of $50 each; that dividends had been declared on the stock for a number of years at the rate of 12 per cent. per annum; that the tolls received by the said company for the use of its works, including Lock and Dam No. 7, have averaged for several years past not less than $240,000; that the market value of the stock was at the time of the inception of these proceedings about $100 per share; that the money value of the entire works and franchise is not less than $4,000,000; that the actual toll receipts of Lock and Dam No. 7 for several years past have exceeded $2,800 per annum, and that a very large increase of such toll receipts at Lock and Dam No. 7, will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam; that by the construction and maintenance of the Company's works a permanent and reliable public highway has been created on which a large and increasing carriage of coal and general merchandise takes place, and that permanent navigation for the largest vessels and steamboats now exists from the city of Pittsburgh, Pa., to or near the line between the States of Pennsylvania and West Virginia; that in view of the present and prospective tolls receivable at Lock and Dam No. 7, the present value of said Lock and Dam No. 7 is not less than $450,000, said value being predicated on said present and prospective tolls; that said Lock and Dam No. 7 are a portion of said company's works, which consist of seven dams, each furnished with a lock or locks; that the navigation, sought,

by these proceedings, to be made free, was mainly created and made possible at all seasons by the construction and maintenance of the Company's works; that a large portion of the tolls received by the company is charged upon merchandise and articles carried between points of shipment and delivery entirely within the State of Pennsylvania and constituting internal commerce of said State, and that a portion of the tolls collectable at Lock and Dam No. 7, for the use of said lock and dam, is chargeable for merchandise, goods and passengers carried between points of shipment and delivery in the State of Pennsylvania, the transportation being wholly within the State as to said portion."

Which offer of evidence was ruled out by the Court below on the ground that the Act of Congress provided, "That in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated."

(See printed record, page 73.)

From this it resulted, that we were prohibited from showing the value of the lock and dam sought to be taken, and were limited in our testimony to evidence of *its mere cost*, without reference to its earning capacity, and without any consideration of it as a means of revenue to the Company. Even the value of our right to take tolls on purely internal commerce of Pennsylvania, passing through said lock and dam, could not be considered.

It will be noticed from the foregoing statement that this is the first step on the part of the United States towards acquiring, for its own use, the entire improvement built by the Navigation Company, each Congress being called

upon to authorize the condemnation of a lock and dam. The condemnation of Lock and Dam No. 6 has been authorized by an Act of Congress approved the 19th day of September, 1890. (U. S. Statutes at Large, Vol. 27, page 438.)

The purpose of Congress is not to clear the Monongahela river of an obstruction to inter-state commerce, not to abate a nuisance, but to appropriate the property of the Navigation Company *for the same identical uses and purposes* for which it is held and used in the hands of the Company itself. There is no complaint, and no finding, upon the part of Congress or any other body, that the tolls charged by the Navigation Company were unreasonable or unjust, or any more than a reasonable reward upon the investment made in the artificial navigation of the stream, or that they constitute any obstruction to free navigation between the States. There never has been any declaration made by Congress or any other body that the improvement is unlawful. On the contrary, however, Congress has co-operated with the Navigation Company in the extension of slack water navigation to Morgantown by means of this very Lock and Dam No. 7, and such slack water navigation to Morgantown, now had, is the result of such co-operation between the Federal and the State agencies.

The position of the respective parties as to the questions of law arising, and the rulings of the Court thereon, will appear from the following references to the record:

The counsel for the United States requested the Court to hold:

1st. That the Monongahela river is and was prior to the construction of the works of the Monongahela Navigation Company thereon a navigable river of the United States and used as such by the public.

2nd. As to navigable streams in the United States which are water-ways of inter-state commerce, the right of a State being subject to the paramount rights of the United States, the Monongahela Navigation Company, deriving whatever right it has from the State of Pennsylvania, can have no higher rights than the State itself.

3rd. The right of said Navigation Company to maintain in the Monongahela river locks and dams is determinable at the pleasure of the National Government.

4th. That under the Act of Congress of the United States under which the proceedings in this case are executed no compensation can be allowed said Navigation Company for the franchise of said Company to collect tolls, and in this regard the Act was a constitutional exercise of the powers of Congress.

Each of these requests by the government counsel was affirmed by the Court.

(See printed record, pages 19 and 20.)

The counsel for the Navigation Company requested the Court to hold:

1st. That the United States do not possess a legal title to the lands and water lying within the limits of a State, nor do they have a right to enter and take possession of a navigable stream within the limits of a State for

every and all purposes; that the powers and rights of the United States over navigable rivers within the limits of a State are based on and limited by the duty to promote navigation and commerce between the States; that accordingly it is not within the legitimate powers of Congress to authorize the condemnation and appropriation by the United States of a system of locks and dams erected by a corporation of a State, in pursuance of powers granted by such State, where such system is efficacious in promoting navigation and where the object of the Federal Legislation is not to remove or abate such locks and dams as obstacles to navigation, but to adopt and subject them to the jurisdiction of the United States as means and facilities of inter-state commerce; that it is only when the action of the State or its grantees in erecting works in navigable streams, is deemed to encoach upon the navigation of such streams as means of inter-state and foreign commerce, that Congress may interfere and control and supercede it.

2nd. That in estimating the damages to which the owners of a system of locks and dams built under authority of law for the promotion of navigation are legally entitled in case of condemnation in order to make such system free for the use of navigators, the earning power and value of the tolls which such owners are authorized to collect and do collect constitute a material element or item; that hence that provision of the Act of Congress under which these proceedings are had, being Act of 1888, Statutes at Large Vol. 24. page 411, prescribing that "In estimating the sum to be paid by the United States the franchise of the Monongahela Navigation Company to collect tolls shall not be considered or estimated," is void and of no effect, *first*, because such provision is an attempt by the legislative power to dictate to the Court, in its exercise of a judicial

function, what shall and what shall not be considered the items and elements of the damages to which the Navigation Company is entitled; and *secondly*, because such provision of said Act of Congress disregards and is in derogation of the Constitution of the United States wherein it provides that private property shall not be taken for public use without just compensation.

3rd. That the said Act of Congress under which these proceedings are had is unconstitutional and void.

All of which requests on the part of the Navigation Company were refused by the Court.

(See printed record, pages 71 and 72.)

The refusal of the Court to hold as requested by the Navigation Company, and the exclusion of the offer of evidence before referred to, constitute our assignments of error.

The precise question presented by the record may be stated as follows:—

When, under State authority, without formal consent, but upon the invitation of Congress, a highly beneficial navigation has been created within the State, by artificial means, in a river, used partly as a means of inter-state commerce, and partly for the purely internal commerce of such State, which navigation was created by the act of the State for the purpose of developing, and has successfully developed such commerce, may Congress, without any finding or declaration that such improvement, or the manner in which it is operated, is unlawful or an obstruction to inter-state commerce, and recognizing the private property in the same, appropriate to the United States, to

be held by it, for the same public use for which it was erected, such improvement, without making compensation therefor, and direct what portion, if any, of the value thereof shall be paid?

ASSIGNMENTS OF ERROR.

The learned court erred:

1st. In refusing to hold as requested in the first prayer of the Monongahela Navigation Company; which prayer is as follows:

That the United States does not possess a legal title to the lands and waters lying within the limits of a State, nor do they have a right to enter and take possession of a navigable stream within the limits of a State for every and all purposes; that the powers and rights of the United States over navigable rivers within the limits of a State are based on and limited by the duty to promote and aid navigation and commerce between the States; that accordingly it is not within the legitimate powers of Congress to authorize the condemnation and appropriation by the United States of a system of locks and dams erected by a corporation of a State, in pursuance of powers granted by such State, where such system is efficacious in promoting navigation, and where the object of the Federal legislation is not to remove or abate such locks and dams as obstacles to navigation, but to adopt and subject them to the jurisdiction of the United States as means and facilities of inter-state commerce; that it is only when the action of the State or its grantees in erecting works in navigable streams is deemed to encroach upon the navigation of such streams as means of inter-state and foreign commerce that Congress may interfere and control and supersede it.

To which the court answered: "This request is refused."

2nd. In refusing to hold as requested in the second prayer of the Monongahela Navigation Company; which prayer is as follows:

"That in estimating the damages to which the owners of a system of locks and dams, built under authority of law for the promotion of navigation, are legally entitled in case of condemnation in order to make such system free for the use of navigators, the earning power and value of the tolls which such owners are authorized to collect and do collect constitute a material element or item; that hence that provision of the Act of Congress under which these proceedings are had, being Act of 1888, Statutes at Large Vol. 25, page 411, prescribing that 'in estimating the sum to be paid by the United States the franchise of the Monongahela Navigation Company to collect tolls shall not be considered or estimated', is void and of no effect, first, because such provision is an attempt by the legislative power to dictate to the court, in its exercise of a judicial function, what shall and what shall not be considered the items and elements of the damages to which the Navigation Company is entitled; and secondly, because such provision of said act of Congress disregards and is in derogation of the Constitution of the United States wherein it provides that private property shall not be taken for public use without just compensation."

To which the court answered: "This request is refused."

3rd. In refusing to hold as requested in the third prayer of the Monongahela Navigation Company; which prayer is as follows:

"That the said act of Congress under which these proceedings are had is unconstitutional and void."

"To which the court answered: "This request is refused."

4th. In sustaining the objection to and excluding the evidence as offered by the Monongahela Navigation Company as set forth in the fourth bill of exceptions; which offer of evidence and objection is as follows:

"The Monongahela Navigation Company, by its counsel, called William Bakewell as a witness on its behalf and offered to prove by him and other witnesses—

That the paid-up capital stock of the Monongahela Navigation Company consists of thirty-two thousand six hundred and thirty-nine shares of fifty dollars; that dividends have been declared on the stock for a number of years at the rate of twelve per cent. per annum.

"That the tolls received by the said Company for the use of its works, including Lock and Dam No.7 have averaged for several years past not less than $240,000; that the market value of the stock was at the time of the inception of these proceedings about $100 per share; that the money value of their entire works and franchises is not less than $4,000,000; that the actual toll receipts of Lock and Dam No. 7 for several years past have exceeded $2,800 per annum, and that a very large increase of such toll receipts at Lock and Dam No.7 will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam."

"That by the construction and maintenance of the Company's works a permanent and reliable public highway has

been created on which large and increasing carriage of coal and general merchandise takes place, and that permanent navigation for the largest vessels and steamboats now exists from the city of Pittsburgh, Pa., to or near the line between the States of Pennsylvania and West Virginia.

"That in view of the present and prospective tolls receivable at Lock and Dam No. 7 the present value of said Lock and Dam No. 7 is not less than $450,000, said value being predicated upon said present and prospective tolls; that said Lock and Dam No. 7 are a portion of said Company's works, which consist of seven dams, each furnished with a lock or locks."

"That the navigation which is sought by these proceedings to be made free was mainly created and made possible at all seasons by the construction and maintenance of the Company's works."

"That a large portion of the tolls received by the Company is charged upon merchadise and articles carried between points of shipment and delivery entirely within the State of Pennsylvania and constituting internal commerce of said State and that a portion of the tolls collectable at Lock and Dam No. 7 for the use of said lock and dam is chargeable for merchandise, goods and passengers carried between points of shipment and delivery in the State of Pennsylvania, the transportation being wholly within the State as to said portion."

To which offer of testimony counsel for the United States objected for the reason that the same was incompetent and irrelevant; whereupon the Court sustained the objection and rejected the evidence.

Fifth. In making the finding upon the evidence in the cause and entering judgment as set forth in the fifth bill of exceptions; which finding and judgment are as follows:

"In pursuance of written stipulation this case was tried by the Court without the intervention of a jury; and therefore, now, this 24th day of December, 1890, on due consideration the Court finds the value of said lock and dam number 7, otherwise known as 'the upper Lock and Dam,' and its appurtenances of the Monongahela Navigation Company to be two hundred and nine thousand dollars ($209,000,) not considering or estimating in this valuation the franchise of said Company to collect tolls, which sum of two hundred and nine thousand dollars ($209,000) the Court fixes and determines as the amount to be paid by the United States to the said Monongahela Navigation Company for the said Lock and Dam No.7 and its appurtenances.

"And let judgment be entered upon the foregoing finding at the end of four days unless in the meantime a motion for a new trial should be entered *sec. reg.* By the Court."

And thereupon judgment was entered as directed by the Court in words as following, to–wit:

"And now, to-wit, December 31, 1890, judgment is hereby entered upon the findings of the Court for the sum of $209,000."

ARGUMENT.

The source of the power that Congress has attempted to exercise in this case is found in the clause of the Constitution giving power to regulate commerce between the States and with foreign countries. The nature of this power has frequently been before this Court, and it has been settled that in respect to local matters affecting commerce, not in their nature requiring or admitting of any national uniformity of regulation, the power of the States, in the absence of Congressional action, is plenary; that the power in Congress is not exclusive of State regulation except as to matters admitting of and, in their nature requiring, uniformity of regulation throughout all the States. The erection of bridges over navigable streams, the establishment of ferries, the erection of dams and locks and the improvement of wharves are familiar examples of local concerns of commerce, proper subjects of State regulation. The result of previous adjudications upon the subject was expressed in *Cardwell vs. American Bridge Co.*, 113 *U. S.* 205, as follows:

"The control of Congress over navigable rivers within the States *so as to preserve their free navigation* under the commercial clause of the Constitution, the power of the States within which they lie, to authorize the construction of bridges over them until Congress intervenes and supersedes their authority, and the right of private parties to interfere with their construction or continuance, have been fully considered, and we are entirely satisfied with the soundness of the conclusions reached. They recognize the full power of the States to regulate within their limits matters of internal police, which embrace amongst other things, the construction, repair and maintenance of

bridges, and the establishment of ferries; that the States are more likely to appreciate the importance of these means of internal communication, and to provide for their proper management, than a government at a distance; and that as to bridges over navigable streams their power is subordinate to that of Congress, as an Act of the latter body is, by the Constitution, made the supreme law of the land, but that until Congress acts on the subject, their power is plenary. When Congress acts directly with reference to the bridges authorized by the State, its will must control *so far as may be necessary to secure the free navigation of the streams.*"

And with special application to the case at bar is the statement of the law in *Wilson vs. Black Bird Creek Marsh Company, 2 Pet. 245; Pound vs. Turck, 95 U. S. 459; Huse vs. Glover, 119 U. S. 543;* and *Sands vs. Manistee River Improvement Company, 123 U. S. 288.* Each of these cases arose from the obstruction, under State authority, of a navigable stream, by means of a dam, or of a system of locks and dams.

In the *Black Bird Creek* case, the Legislature of the State of Delaware authorized the construction of a dam across the creek for the purpose of reclaiming marsh lands and improving the health of its inhabitants.

"But the measure authorized by this act," said Chief Justice Marshall, "stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no

cognizance. * * * If Congress had passed any Act which bore upon the case; any Act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. We do not think the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed upon the subject."

The case of *Pound vs. Turck* arose over the obstruction by a dam and boom, of the Chippewa river, done under the authority of the Legislature of Wisconsin. Mr. Justice Miller, in delivering the opinion of this court, expounded the settled law upon the subject as follows:

"There are within the State of Wisconsin, and perhaps other States, many small streams, navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw-logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are sub-

stantial obstructions to general navigation, and more or less so to rafts and barges. But to the Legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local Legislatures."

In the case of *Huse vs. Glover*, it appeared that by various Acts of her Legislature, the State of Illinois adopted and executed measures for the improvement of the Illinois river, including the construction of a lock and dam at several points on the river. Under authority of the State, tolls were exacted for the passage of vessels through the locks, and so much of the revenue derived from such source as was not necessary to keep the works in repair was paid quarterly into the State treasury as a part of the general revenue of the State. In considering the validity of these acts of the State, in the alleged improvement of the navigation of the stream, Mr. Justice Field, after referring to the case of *Escanaba Company vs. Chicago*, construing the provision of the Northwest Ordinance, providing that the navigable waters leading into the Mississippi and St. Lawrence rivers should be common highways forever free, without any tax, impost or duty, says of the acts of the State providing for the collection of tolls:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means by the removal of obstructions or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves or docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels. The State is interested in the domestic as well as in the inter-state and foreign commerce conducted on the Illinois river, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to, encroach upon the navigation of the river as a means of inter-state and foreign commerce, that that body may interfere and control or supersede it. If, in the opinion of the State, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state—and on that point the State must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. * * * * How the highways of a state, whether on land or water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose in the cases mentioned."

Citing: *Spooner vs. McConnel*, 1 *McLean* 337; *Kellog vs. Union Company*, 12 *Conn.* 7; *Thames Bank vs. Lovell*, 18 *Con.* 500; *McReynolds vs. Smallhouse*, 8 *Bush*, 447.

"By the terms tax, impost and duty, mentioned in the Ordinance, is meant a charge for the use of the government, not compensation for improvements."

Under these decisions it cannot be controverted that the State of Pennsylvania, in the absence of any Act of Congress with which such action on her part might conflict, had the lawful right and power to incorporate the Monongahela Navigation Company, and to authorize it to construct a system of locks and dams in the Monongahela river for the improvement of its navigation, and also to authorize the Company to collect a reasonable reward in the shape of tolls upon vessels using the artificial facilities for navigation, thus afforded by the money of the Navigation Company. The enormous benefit resulting both to the internal commerce of the State, as well as to interstate commerce originating in the State, is shown by the finding of the Court below that since and by reason of the artificial facilities for navigation afforded by the improvement made by the Company, as much commerce is carried over the artificial navigation in a single day as was carried on the stream in its natural state in a whole year. No fact could more conclusively or eloquently speak the propriety and wisdom of the State in thus providing for the development of its internal commerce, and the commerce between it and the lower States on the Ohio river. In fact, the coal fields of Pennsylvania along the Monongahela Valley have been made available to the citizens of Ohio, Kentucky, Indiana, Illinois, Missouri,

Mississippi and Louisiana, only by means of the improvement of the navigation of the Monongahela river, authorized and executed under the authority of the State of Pennsylvania.

It well illustrates the truth of Mr. Justice Field's remark in *Cardwell vs. American Bridge Company*, that "the States are more likely to appreciate the importance of these means of internal communication and to provide for their proper management than a government at a distance"; and of the remark of Mr. Justice Miller in *Pound vs. Turck* "that to the Legislatures of the States may be appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accomodate the interest of all concerned in the matter."

The commerce developed on the river, by means of the improvement, is the best possible evidence of the wisdom of the terms under which its construction was authorized by the State, and the prudence, skill and propriety of its management.

Under the decisions cited, the power of Pennsylvania in this behalf, in the absence of any Act of Congress, is plenary. There can be no pretence that there is, or ever was, any Act of Congress with which the Act of the State comes in conflict.

The first Act of Congress passed in relation to the Monongahela river was the Act of 1881, inviting the Company to construct this very Lock and Dam No. 7, as set forth above in our statement. Its first Act therefore was

not to supersede or collide with any Act of the State, but was intended to, and did invite and secure the further improvement of the river under the State authority. The very first step that Congress took with reference to the navigation of the river was the act referred to, appropriating money to be expended on the river in West Virginia, provided and only upon condition, that the State of Pennsylvania, acting by the Navigation Company, would undertake in good faith the building of the lock and dam now sought to be appropriated. The State's agent, the Navigation Company, in order to procure the improvement of the river in West Virginia by Congress, did as demanded by Congress, undertake in good faith, and did build, Lock and Dam No. 7; built it under the only authority it had, —the Charter of the State; and built it under the terms of that Charter, providing a reasonable reward to the Company for the investment, by the charging of tolls upon vessels using the navigation thus created.

Such was the first act of Congress in any manner or form concerning the improvement of the navigation of the river; and so far from the Act of the State coming in conflict with this Act of Congress, it is apparent that Congress recognized the State authority, and invited and secured further investment under such authority, in the manner and upon the terms provided by it.

The only other Acts of Congress concerning the Monongahela river, down to the Act under which these proceedings originated are, the Act of 1882 appropriating $25,000 for continuing the improvement of the river in West Virginia; the Act of 1884 appropriating $45,000 for continuing the improvement of the river in West Virginia; the Act of 1886 appropriating $90,900 for continuing the im-

provement of the river in West Virginia; the Act of 1886, authorizing the Secretary of War to ascertain the value and commercial importance of the Monongahela Navigation Company in the State of Pennsylvania; the Act of 1888 appropriating $35,000 for continuing the improvement of the river in West Virginia. (All of these Acts will be found printed in the Appendix.)

None of these Acts in any way conflict with the Acts of the State, or in any manner recall or qualify the distinct recognition of the State authority contained in the Act of 1881; or undertake to alter or rescind the arrangement between Congress and the Navigation Company made in pursuance of the Act of 1881, and under which the Company invested its money in the construction of Lock and Dam No. 7.

Surely then there can be no room for argument that down to the passage of the Act under which these proceedings originated, the improvements made by the Monongahela Navigation Company were lawful improvements; the Navigation Company was lawfully in the possession of the management and operation thereof, with lawful power to collect reasonable tolls as its reward upon the investment made, and that such lawful proprietorship was recognized by Congress and a very large additional investment in the improvement of the river made by an arrangement with Congress to secure the extension of the improved navigation, under Federal aid, into West Virginia.

The next Act, in order of date, by Congress, is the Act under which these proceedings originated, and which it is argued altogether changed this condition of affairs; changed the improvement of the Navigation Company from a lawful improvement to one without authority; made that unlawful which was previously lawful, and prostrated

the whole property of the Navigation Company at the foot of Federal authority, to be dealt with upon such terms of grace as Congress might see fit to grant, under the clamor of navigators, who wish the people of the United States to pay for the maintenance and repair of the works, instead of having the same paid by the tolls collected from the persons using them; and that even the investment, made upno the distinct invitation, and by arrangement with Congress, is held in like mercy.

This remarkable result is supposed to be effected by an Act of Congress not undertaking to revoke or rescind the arrangement made by Congress for the construction of Lock and Dam No. 7; not finding or declaring the improvement unlawful or in conflict with any Act of Congress; not finding or declaring the improvement any hindrance or obstruction to inter-state commerce; but by an Act authorizing the purchase by the United States of Lock and Dam No. 7, *recognizing and acknowledging it as the lawful property of the Navigation Company*, and recognizing its value as an aid to commerce to the extent at least of $161,733.13; and expressly recognizing that this is not its full value by stipulating that its full value shall not be paid,—that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated, notwithstanding we built it at the instance of the United States, under the only authority we had, which authority gave us the right to collect tolls as our reward upon the investment, and which franchise was the sole inducement for making the investment. With such an Act of Congress before us we are compelled to realize that the provision of the Constitution, that private property shall not be taken for public use without just compensation, is not altogether an unnecessary one.

Leaving out of consideration altogether the Act of Congress of 1881, arranging for the building of this lock and dam by the Navigation Company under State authority, and admitting to the fullest extent, to which any decision goes, the paramount authority of Congress over the concerns of inter-state commerce, yet surely Congress cannot purchase or appropriate structures erected lawfully, and still lawfully held and operated, without making just compensation therefor.

Granting, for the purpose of argument, that in the exercise of its paramount power, Congress may interfere and supersede the Act of the State, or any acts done under State authority, yet surely Congress cannot treat that as unlawful which yet conflicts with no act or declaration of it; when the State authority has not been superseded by congressional action, but when the very act under which it is so proposed to treat the State authority, the property of the State's agent is recognized, as well the beneficence and lawfulness of the State's improvement.

The Navigation Company built Lock and Dam No. 7, because it supposed it could secure a reward for the investment by the collection of tolls from vessels using the navigation thus created. The whole value of the lock and dam to the Navigation Company consists alone in this right to collect tolls. As it is a work erected for public use, in a public highway, this right is really the only private property that the Navigation Company has in the improvement. There never was and is no Act of Congress prohibiting or striking down the right of the Company to collect tolls as allowed under the authority in pursuance of which the improvement was made. Notwithstanding any Act ever passed by Congress, even the appropriating

Act under which these proceedings originated, *it is undeniably lawful for the Navigation Company to charge and collect tolls at this lock and dam down to this very hour, and until after the purchase price is paid*, and this right is its private property, and that alone which gives to its investment any commercial value whatsoever.

Now, without superseding the State authority under which this right exists, Congress proposes to purchase or appropriate, under the right of eminent domain, this lawful property of the Navigation Company, still so remaining lawful, and in the Act of purchase, or of appropriation, direct that the value of the improvement as measured by this still existing lawful right of the Navigation Company to collect tolls—the right from which the only value of the improvement is given—shall be disregarded. In appealing to the judiciary to settle the price to be paid, it directs at the same time the measure of compensation to be made for this lawful improvement.

Congress cannot, in the same breath, treat the improvement as the lawful property of the navigation Company, providing for its purchase, and conveyance of the title thereto to the United States, and also, as unlawful and a nuisance, not the proper subject of property at all. But, by the terms and the whole spirit of the Appropriation Act, Congress has recognized and acknowledged the title and property of the Navigation Company in the structure; *by the very terms of the Act*, this proceeding is to effect the appropriation *of property, and the transfer of title.* In appropriating property, "just compensation" must be paid; such compensation can only be *full value* to the owner. It is certainly not for Congress to say what elements shall, or shall not, be considered in estimating such value.

The proper elements of inquiry, in ascertaining the compensation, must be settled by the judiciary, or the special tribunal whose duty it is to conduct the inquisition. The Legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules or principles upon which it shall be computed. *Per* Mr. Justice McLean, in *Charles River Bridge vs. Warren Bridge, 11 Peters, page 571; Penn'a R. R. vs. B. & O. R. R., 60 Md. 263; Commonwealth vs. P. & C. R. R. Co., 58 Pa. St., 26; Isom vs. Miss. Cent. R. R., 36 Miss. 300.*

"The law will imply a promise to make the required compensation where property *to which the government asserts no title*, is taken, pursuant to an Act of Congress, as private property to be applied for public uses." *United States vs. Great Falls Manfg. Co., 112 U. S. 645, 656.*

Now, granting for the purpose of the argument again, the right of Congress to supersede the State authority and strike down the right of the Navigation Company to collect tolls on inter-state commerce, yet, under all the decisions, until such paramount authority is exercised by Congress, the right of the Company under the State authority is complete. There has been no such exercise of its paramount power by Congress, and the right and property of the Company, under the State authority, still remains, and, so remaining, the attempt is here made to take the property for the use of the United States without just compensation.

If such be the law, millions of property lie at the mercy of Congress. As said by Mr. Justice Field, in his opinion

in *Bridge Company vs. United States*, 105 *U. S.* 492. "It must also be borne in mind that the power to regulate commerce with foreign nations and among the several States extends to such commerce on land as well as to that on navigable waters. There are highways on land in every State on which a far greater commerce, both inter-state and foreign, is conducted than that which is borne upon its navigable waters. Congress can require that this commerce shall be as free from unnecessary obstruction as that on navigable waters, connecting two or more States, or leading to the sea. There is nothing in the Constitution which in any respect distinguishes the regulation it may exercise in either case. *Its power in all its extent and with all its limitations, is the same in both.*" And so we see that all highway bridges over streams between States, built under State authority, all inter-state railroads, all inter-state turnpikes, all inter-state canals,and all inter-state telegraph lines, may be appropriated by Congress without compensation, or upon such measure of compensation as Congress may choose to dictate to the judiciary. In the exercise of its power to regulate interstate commerce, Congress may build inter-state railways, as it may improve inter-state streams. For the purpose of inter-state commerce it may condemn and appropriate existing inter-state railways. And if, instead of building a railway for inter-state commerce, it should see fit to appropriate one already built under State authority alone, the contention of the other side is it may direct the judiciary, in estimating the value of the property to be taken, to disregard altogether the right of the State railway company to collect tolls or charges for transportation. For the promotion of commerce between the States, Congress may bridge the intervening river. Or, instead of building a bridge, it may condemn one already in existence between two States, such as one of the many bridges over the Ohio.

If it condemns instead of building, the contention of the other side is, it is not obliged to make just compensation, but may direct the value of the bridge, as measured by its earning capacity, under the right of the Company to charge tolls, shall not be estimated or regarded.

In short, if the contention of the other side be sound, every instrumentality of inter-state commerce, erected and managed under State authority is a proper subject for confiscation by Congress under its power to regulate commerce between the States. And this no matter how materially such structures have aided in the development of inter-state commerce, or of what advantage or benefit to such commerce the erection and management of such structures may have been.

There are certainly many millions of dollars invested in bridges over navigable streams, within the States, erected and existing under State authority only, and the inducement to their erection was the right under State authority to receive an income on the investment by charging tolls. The proposition of the other side is that such franchise may be property in the several States under whose authority the erection may be made, but that the United States need not recognize it as a subject of compensation, or as an element or measure in fixing the value of the structures when Congress chooses to appropriate them as highways of inter-state commerce, and make them free from tolls, though the commerce Congress seeks to aid may have been wholly created by such artificial means. The proposition, to say the least, is interesting in its novelty, and if correct, is monstrous in its results. The mere suggestion of the results of the proposition is enough to show that it cannot be correct.

So much on the argument that Congress might, in the exercise of its paramount power, supersede the action of the State in its creation of the Monongahela Navigation Company, and the improvement by it of the Monongahela river.

But it is fairly questionable, to say the least, whether Congress could so supersede the authority of the State of Pennsylvania, exercised in the manner and to the effect exhibited by the record in this case, at least, without finding and expressing its judgment that the action of the State constituted an obstruction or hindrance to inter-state commerce.

Historically, at least, beyond question, the power in Congress to regulate inter-state commerce, is to prevent State restrictions upon such commerce, by investing Congress with power to strike down all such restrictions. It was not intended that Congress should strike down, or by its acts, *discourage* the States in creating aids to commerce. This historical purpose of the provision has been accepted by this Court, and the power of Congress limited by the purpose so established.

In *County of Mobile vs. Kimball* 102 *U. S.* 69; 669, this Court used the following language:

"The improvement of harbors, bays and navigable rivers within the State falls within this last category of cases. The control of Congress over them is *to insure freedom in their navigation*, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability, or by other legitimate improvement. The States have as full control over their purely internal commerce

as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce, and insure its safety, they have an undoubted right to remove obstructions from the harbors and rivers, deepen their channels and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government. The Legislation of the States for the purposes and within the limits mentioned does not infringe upon the commercial power of Congress."

The jurisdiction of Congress over navigable rivers, under the commercial clause, is therefore justly limited to the purposes of the clause, viz, to insure freedom in their navigation; that is to say, to prevent the States, within whose territory the waters may lie from restricting citizens of other States in their navigation of the stream, or making discriminations in such navigation in favor of their own citizens as against the citizens of all other States. Such freedom as the clause was intended to enable Congress to secure is not encroached upon by the improvement of the navigation of such streams by State authority, where the improved navigation is left free to the citizens of all the States, without hindrance or discrimination. The charging reasonable tolls as the compensation for artificial facilities furnished is not inconsistent with the freedom of navigation intended to be secured by the vesting of this power in Congress.

As was said by this Court in *Huse vs. Glover*, the freedom of navigation secured by the Northwest Ordinance did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or

by the making of dams for deepening the waters, or by turning into the rivers, waters from other streams to increase their depth. "For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels."

And in *Packet Company vs. Keokuk*, 95 U. S. 80, 84, speaking of the validity of an ordinance of the city of Keokuk, providing for the collection of charges from vessels using the improved wharves of the city, this Court held:

> "A charge for services rendered, or for conveniences provided, is in no sense a tax or duty. It is not a hindrance or impediment to free navigation. * * * * Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload is rendering them a service."
>
> "And by free 'navigation' is not meant a navigation entirely free of obstructions. In the sense in which these terms are used by European jurists, the navigation of a river is free, when it is not entirely interrupted, and not embarrassed by oppressive duties exacted by riparian States. In this country the navigation of a river is deemed to be free when it is kept open for vessels cleared of such physical obstructions as would retard their passage beyond what is required for the necessary transit over the stream, and is exempt from exactions and delays other than for the enforcement of quarantine and health laws, and such occasional tolls as may be levied to meet the expenses of improving its navigation. The de-

lays attendant upon the necessary transit of persons and property or the enforcement of quarantine and health laws, or the exaction in exceptional cases of tolls are not deemed to be inconsistent with the free navigation of the river in the legal sense of those terms." *Per* Mr. Justice Field in *Bridge Company, vs. United States, 105 U. S. 496.*

If this be so, then, what Act of the State of Pennsylvania has interfered with or hindered the freedom of the navigation of the Monongahela river, to secure which the power invoked by Congress was alone vested by the Constitution in that body? It is admittted that the State has made the river navigable at all seasons of the year, and that in its natural condition it was only navigable at limited periods. The State has made it navigable for the largest steamboats, and in its natural state it was only navigable at limited periods for boats not exceeding a capacity of fifty tons. It has made it navigable throughout its entire length, within the limits of the State, and in its natural condition it was only navigable at any season for a limited distance. It has made no restriction upon the navigation thus created; but it has always been held open to navigators of any State or country paying compensation for the use of the artificial navigation afforded. It has created an inter-state commerce where none existed, and it has unlocked the coal beds of the Monongahela Valley to the people of all the States touched by the waters of the Ohio and Mississippi and all confluent navigable streams. It is the Act of the State of Pennsylvania that has created this enormously valuable inter-state commerce, and has continually fostered its growth until it has reached its present magnificent proportions.

To secure the freedom of this commerce so created was the purpose of granting to Congress the power to regulate commerce between the States. The freedom of this commerce, it is not pretended, has been interfered with or hindered by the State of Pennsylvania; and in the absence of any finding or any declaration that the State of Pennsylvania, or its agent, the Navigation Company, has hindered, either by its works, or by the manner of their operation, the commerce so created; and with the confession, on the contrary, that it has fostered and built up a free commerce between the States, Congress now interposes, under the power mentioned, given for the purpose mentioned, and undertakes, in the name of free commerce, to appropriate to the United States this valuable improvement, without making compensation.

We contend, in the language of our first request for instructions:

> "That the powers and rights of the United States over navigable rivers within the limits of a State are based on and limited by the duty to promote and aid navigation and commerce between the States; that accordingly it is not within the legitimate powers of Congress to authorize the condemnation and appropriation by the United States of a system of locks and dams erected by a corporation of a State, in pursuance of powers granted by such State, where such system is efficacious in promoting navigation, and where the object of the Federal legislation is not to remove or abate such locks and dams as obstacles to navigation, but to adopt and subject them to the jurisdiction of the United States as means and facilities of inter-state commerce; that is only when the

action of the State or its grantees in erecting works in navigable streams is deemed to encroach upon the navigation of such streams as means of inter-state and foreign commerce, that Congress may interfere and control and supersede it."

The right of Congress to act has been limited in all the decisions of this Court to cases where, in the judgment of Congress, its action is necessary to secure the end of the power granted to it to regulate commerce, to wit, the insuring of the freedom of such commerce between the States. Thus the language of Mr. Justice Field in *Cardwell vs. American Bridge Company*:

"When Congress acts directly with reference to bridges authorized by the State, its will must control *so far as may be necessary to secure the free navigation of the streams.*"

Thus again, in *Huse vs. Glover:* "The State is interested in the domestic as well as in the inter-state and foreign commerce conducted on the Illinois river, and to increase its facilities and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of inter-state and foreign commerce, that that body may interfere and control, or supersede it."

To permit Congress to act without reference to the purpose of the power would be to sanction the subversion and perversion of the intention of the clause. If Congress possesses the power to interfere concerning the Monongahela river without reference to securing the freedom of navigation, it could have so interfered in 1836, when our charter was granted, and prohibited the execution of the

improvement, and have compelled the stream to have remained in its natural condition, practically useless for purposes of commerce, until it chose to act, for the first time, in the year 1881. If so, then under a power given for the security and promotion of commerce between the States, it could, by its act under such power, have prevented for forty years the growth and development of the large inter-state commerce now existing by the fostering care of the State of Pennsylvania, and have compelled the State to lock up its coal fields, except as outlets might be afforded by railroad or other highways than the river.

And if it could thus interfere to prevent the improvement of the river for purposes of commerce, under State authority, it could, upon the same principle, prohibit the State from constructing a railroad within its territory intended for the transportation of goods beyond State lines. In fact no highway, no dock or wharf, no instrumentality of commerce that at any time might become useful or beneficial in the handling of inter-state traffic, could be erected by the State, if Congress should choose to interfere. Surely such is not the law.

We contend that Congress could not thus have interfered under the power given, because the act of the State was in aid of commerce between the States, most effectually promoted that commerce, and has continuously secured the free navigation of the stream; that Congress could not prohibit such act on the part of the State of Pennsylvania, and thereby have prevented the development of commerce as intended by the State. It could not have so interfered for two reasons: *First*, because the only power to which it could appeal is a power given for the

purpose of striking down State restrictions on inter-state commerce, not for the purpose of striking down acts of the State intended for and actually promoting such commerce; and *secondly*, because the State of Pennsylvania has the right to develop her own internal commerce upon streams within the State, free from any interference or control by Congress or any other body; and her internal commerce has been largely promoted by the improvement of the Monongahela river.

If Congress could not have interfered to prevent the State erecting the improvement, it certainly cannot interfere after its erection, and command its abatement or confiscate the works.

It will be noticed that the Act of Congress authorizing the appropriation, directs that in estimating the sum to be paid by the United States "the franchise of said corporation to collect tolls shall not be considered or estimated," not even the tolls collected upon the purely internal commerce of Pennsylvania, passing through the lock.

At the trial we offered to show: "That a large portion of the tolls received by the Company is charged upon merchandise and articles carried between points of shipment and delivery entirely within the State of Pennsylvania, and constituting the internal commerce of said State, and that a portion of the tolls collectable at Lock and Dam No. 7, for the use of said lock and dam, is chargeable for merchandise, goods and passengers carried to points of shipment and delivery in the State of Pennsylvania, the transportation being wholly within the State as to said portion."

On such commerce, the State has given us the right, under our charter, to charge and collect reasonable tolls. But even the value of the property, as measured by such tolls collectable, could not be estimated in this proceeding. And yet, as to this internal commerce of the State, Congress has no power or jurisdiction whatsoever, and the right of the State of Pennsylvania to make regulations affecting it, regardless of Federal authority, is unquestionable.

As was said in *County of Mobile vs. Kimball:* "The States have as full control over their purely internal commerce as Congress has over commerce among the several States, and with foreign nations; and to promote the growth of that internal commerce and insure its safety, they have an undoubted right to remove obstructions from their harbors and rivers, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government."

There was no evidence offered in the Court below, it has not been declared by Congress, and there is no pretence, that the right of the Company to charge tolls on the internal commerce of the State impaired the free navigation of the river as permitted under the laws of the United States, or tended to defeat any system for the improvement of navigation provided by the general government. And yet the value of the property, as measured by such tolls, could not be considered, because Congress had so dictated to the Court.

To sustain the power of Congress to thus confiscate the property of the Navigation Company, in the face of the repeated adjudications of this Court in respect to the limitations of said power, counsel for the government mainly rely upon the decision of this Court in the case of *Newport and Cincinati Bridge Company vs. the United States*, 105 *U. S.* 470.

This case, when rightly understood, we think has no bearing on the question now before the Court, as will be made clear by calling attention to the following facts: The Bridge Company was first incorporated by the Legislature of Kentucky, with power to build a bridge across the Ohio river between Newport and Cincinnati, which provided that the bridge should be constructed so as not obstruct the navigation of the Ohio river further than the laws of the United States authorized. In the same year the Legislature of Ohio also incorporated a company and authorized it to build a bridge between the same point, provided that the bridge should be erected in accordance with the provisions of an Act of Congress approved July 14th, 1862, entitled "An Act to establish certain post roads" or of any Act Congress may hereafter pass on the same subject. The two State corporations thus incorporated were consolidated into one company, the consolidated company having the general powers of the divisional companies, with the duties and limitations of each, thus subjecting the consolidated company to the provision in the charter of the Ohio company that the bridge should be built so as to conform to the Act of Congress referred to, or any Act Congress may hereafter pass on the same subject.

Congress passed an Act consenting to the erection of the bridge by the consolidated company, upon certain terms, with the following provision:

"But Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge."

The consolidated company commenced the erection of its bridge in accordance with the Act of Congress granting assent thereto; but before its completion Congress, in pursuance of the power reserved to it, to withdraw its assent or to direct modifications, passed an Act declaring it unlawful for the bridge company to proceed with the erection of the bridge, unless certain modifications therein specified were complied with by the company. The company at great costs made the modifications in its plans.

The question in the case was as to whether, or not, the United States was legally liable to make compensation to the Bridge Company for the expense of modifications thus made in pursuance of the direction of Congress, *given under its reserved right to withdraw its assent or direct modifications.*

This Court held that, in as much as the Bridge Company had appealed to and accepted a grant from Congress expressly reserving, upon the face of it, a lawful right in Congress to withdraw the assent at any time, or to direct any modifications that it, in its judgment might seem fit, the Bridge Company, having accepted such limited grant, had no legal right to complain of the exercise of the reserved power in Congress; *That the right of Congress to interfere had been made and established by contract between the parties.*

The Chief Justice said:

> "*No question can arise in this case upon what the States have done, for both Ohio and Kentucky required the Company to comply with the regulations of Congress* Neither are we called upon to determine what would have been the rights of the Company, if, in the original license, no power of future control by Congress had been reserved. * * * * * *
>
> "In the present case, the Bridge Company asked of Congress permission to erect its bridge. In response to this request permission was given, but only on condition that it might be revoked at any time if the bridge is found to be detrimental to navigation. This condition was an essential element of the grant, and the Company is accepting the privileges conferred by the grant assumed all risks of loss arising from any exercise of the power which Congress saw fit to reserve. What the Company got from Congress was the grant of a franchise expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce. This franchise was a species of property, but from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared in express terms on the face of the grant by which it was created. * * * * * In our opinion Congress did no more than it was authorized to do and there is no liability resting upon the United States to answer in damages."

It is apparent, from the majority opinion, that, what would have been the rights of the Bridge Company under the State authority was not considered as a question properly involved in the case, because the States had expressly

subjected the Company to the will of Congress, expressed by its legislation then existing, or to be thereafter enacted. But this very question, so expressly stated by the Chief Justice as not involved in the decision, is *the question* in our case. And again, it is apparent that the States, having subjected their corporation to the will of Congress, the decision is placed upon of the terms obtained by the State corporation from Congress, and the whole decision is no more than a construction of the terms of the contract between the parties, and involves, not the power of Congress under the constitutional clause, but only the right of Congress, *as a party to, and under the terms of the contract with the Bridge Company.*

This decision cannot be authority for the proposition that must be maintained in this case in order to support the judgment of the Court below, for two reasons: First, the power exercised by Congress in the bridge case was the power to clear the Ohio river of a nuisance and an obstruction to commerce; and, secondly, the power was exercised in accordance *with the contract right which* Congress reserved in granting its consent, and which defeasible grant the Bridge Company accepted, and thereby contracted with Congress to subject itself to any modifications which Congress might see fit to direct.

To make the case referred to resemble the case presented by this record, we must suppose Congress to have passed an Act appropriating the property of the Bridge Company for the alleged promotion of commerce between the States of Ohio and Kentucky; the bridge to be held and used by the United States as a highway between the said said States, for the accommodation of commerce by land passing from the one State to the other; in other words to be held

by the United States for the same uses and purposes for which it was held and used in the hands of the Bridge Company. And in the supposed act thus appropriating the bridge, we must also suppose Congress to have inserted a direction that in estimating the value of the bridge to be paid by the United States, the franchise of the Bridge Company to collect toll on commerce between Kentucky and Ohio should not be estimated. We should then have precisely our case, because it will be noticed that in the Act of Congress consenting to the erection of the bridge, the terms of its consent are confined exclusively to the relation between the bridge and the Ohio river, not referring to the bridge as a means of commerce between Kentucky and Ohio. So that the authority of the Bridge Company to collect tolls on the traffic over it was not recognized or sanctioned by Congress at all, certainly not more definitely than the invitation of Congress to us to build Lock and Dam No. 7, sanctioned our right to collect such tolls as might make a reasonable reward on our capital invested.

If Congress had passed an Act, such as supposed, for the condemnation of the Newport and Cincinnati bridge, could there be any question as to its invalidity? If instead of removing a physical obstruction to the navigation of the Ohio river, and abating a nuisance in the stream, it had undertaken to deal with the bridge as an established highway and mode of commerce between Kentucky and Ohio, and to appropriate and use it for such purposes, is there any doubt, but that in making such appropriation, it would be bound to make just compensation, not partial, or such limited compensation as it might see fit to direct? And yet, if such Act, as the one supposed, had been in-

volved in the Newport and Cincinnati bridge case, then, and only then, would the question have been similar to the one involved in the case at bar.

If the bridge case is no authority for the Government, then surely there is none to be found in the decisions of this Court. As the decision of the Court expressly excluded from consideration any question *upon what the States of Ohio and Kentucky had done*, as well, also, any question of the power of Congress outside of the power voluntarily given by the Bridge Company under the terms of the contract, the language of Mr. Justice Bradley does not conflict with the reasons given for the judgment:

> "I should not have much difficulty in holding, if it were necessary to the decision of the case, that such structures made in conformity with the laws of the State, if not prohibited by any Act of Congress, and not materially interfering with navigation, *would be equally lawful and entitled to the protection of the Constitution*. There is a vast amount of property of this sort in this country. The wharves which have been extended below low water mark, the flats covered by shallow water which have been reclaimed, and the many bridges which have been erected over navigable streams, are nearly all of this class. Navigation has rarely been materially interfered with in these works, the States themselves being deeply interested in preserving it free from obstruction. It would be strange if Congress could destroy this species of property without any compensation whatever."

The decision of the Court, upon the reasons given for it, is not at all inconsistent with the principle so announced

by that distinguished Judge, and had it not been for the terms of the power, voluntarily given by the Bridge Company to Congress, under the reservation in the consenting Act, we think every member of the Court, then sitting, would have joined in the expression,—"It would be strange if Congress could destroy this species of property, without any compensation whatever."

Let us not be misunderstood. We do not contend that the United States, when it appropriates our improvement is bound to purchase our franchises held from the State. The Government needs no such franchises in its possession and use of the property, and so, of course, needs not to purchase them. Of what we complain is the fact that the Act of Congress refuses us compensation for our property in the works, in that, it directs "that in estimating the sum to be paid by the United States the franchise of the Navigation Company to collect tolls shall not be considered or estimated;" and that, it is only by considering the revenue derivable from the works, under our right to collect tolls, that the just value of the works can be ascertained. We insist upon regarding the earning capacity of the property, present and prospective, under our franchises, in fixing its present cash value. We offered to show that this particular lock and dam measured by its present and prospective earning capacity, is now worth not less than the sum of $450,000, but the Court, under the direction of Congress, refused to look at its earning capacity at all, and valued it only as so many logs and stones in place as a lock and dam, and so estimating it, awarded only $209,000,—less than one-half of its value as offered to be shown. As the United States might build a like new dam and lock for that sum, it may well be that the award is all that the

property is worth to the Government, but what it may be worth to the Government is not the measure of just compensation to us; that can only be measured by the value of the property to us, and the value of the property, can only be measured by the revenue it produces. Take away all revenue, present and prospective, and to us it is worthless; worse than worthless, because a permanent source of expense; but it is only by our franchise or right to take tolls that any revenue can be produced. Disregard that right, throw it out of sight, and all value to us is gone. It would be as lucrative for us to own one of the Pyramids of Egypt, as to own this dam without right to collect tolls. Yet the Government that takes it from us, as if it were a Pyramid on our hands, has itself the right to make profit out of it by charging tolls, if it will!

But what it is worth to the United States is wholly immaterial,—the question is, what it is worth to us? Its worth to us, as we have shown, can only be measured by its profit to us, present and prospective; yet, that we have made or shall make profit out of it, must not be considered, says the purchaser.

The correct method of valuing a toll bridge, when appropriated by the County, was discussed in the case of *Montgomery County vs. Bridge Company*, 110 *Pa.*,54. The County contended that "the measure of damages is the cost of the construction of a new bridge at the time of the taking by the County, similar to the present one, diminished by an amount in proportion to such cost equal to the depreciation of the old bridge from wear and decay." It will be seen that this is the precise measure of damages

laid down for us by the Act of Congress, if any thing can be seen in the obscure language used. The present Chief Justice of Pennsylvania said of this proposition:

> "The learned Judge very properly declined to affirm this point. The vice of it consisted in the fact that it substituted one of the the elements of damage, for the measure of damages itself. The bridge structure, the stone, iron and wood, was but a portion of the property owned by the Bridge Company and taken by the County. There were the franchises of the Company, including the right to take toll, and these were as effectually taken, as was the bridge itself. Hence to measure the damages by the mere cost of building the bridge, would be to deprive the Company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation, than can its tangible corporeal property. Their value necessarily depends upon their productiveness. If they yield no money in return over expenditures they would possess little if any present value. If, however, they yield a revenue over and above expenses, they possess a present value, the amount of which depends, in a measure, upon the excess of revenue. Hence it is manifest that the income from the bridge was a necessary and proper subject of inquiry before the jury. * * * * *Nor is the value of the bridge to the county a material inquiry.* The county may have made a mistake; the bridge may not be worth to the county what the jury fixed as the damages; the county might perhaps have built a new bridge over the stream, for half the money, but it did not do so; it elected to take the

property of the bridge company, *and the inquiry, under such circumstances, is not what it is worth to the party taking, but its value to the Company that is deprived of its property.* * * * The property taken was of a peculiar character and can hardly be said to have a market value. It was a bridge and the corporate franchise of the company owning it. There are no sales of such property by which it can be compared, and, the market value in the fair sense of the term ascertained. One bridge may be of little value because unproductive; and another one of no greater size and cost, by reason of its location, may be extremely valuable. *The property and the franchises of the bridge company are represented by its stock, and the market value of the stock may be said to represent the market value of the property taken as nearly as it can be ascertained.*"

That the method, laid down by the Supreme Court of Pennsylvania, is the correct method for arriving at the value of this species of property, is illustrated by our offer in this case.

We offered to show that the capital stock of the Navigation Company consists of 32,639 shares of $50 each, face value, or $1,631,950; and the market value of this stock was, at the time of the inception of these proceedings, about $100 per share, or a total of $3,263,900; and that dividends had been declared on the stock for a number of years at the rate of 12 per cent. per annum, or $195,834 has been distributed on $1,631,950, which is equal to an income of 4 per cent. upon $4,895,600, which latter sum, considering the prevailing rates of interest that can be secured on first-class permanent investments, represents the

value of the Company's entire improvement. If, however, the measure of valuation attempted to be laid down in the Act of Congress is valid, less than half this sum can be realized on the sale of the improvement to the United States. Or, in other words, property netting regularly 4 per cent. on $4,895,000 is to be taken by the United States for less than $2,000,000, or more than one-half of its value confiscated to the Government. It would be strange indeed if such a result could be wrought out of the work of the framers of the Constitution, who manifested every anxiety to hedge about, with most stringent safeguards, the liberty and property of the individual citizen. It must be beyond question that when they gave to Congress the power to regulate commerce among the States, they never dreamed that they were opening the door to the exercise of an arbitrary power which would rise up to mock all the safeguards that they had intended to throw around the rights and property of the citizen.

If the clause in the Act of Congress referred to is invalid, then the entire Act of Congress must fall, for the reason that the invalid clause cannot be stricken out, and the remainder of the Act allowed to stand, without defeating the manifest intent and purpose of Congress. It is obvious that Congress did not intend to pay just compensation for the property, and without the proviso in the Act prohibiting the granting of such compensation, the Act itself could not have passed. The buyer has fixed its own method of purchase, and has expressed its intention not to buy except and only upon such methods. When you defeat its method therefore, you defeat its whole purpose to purchase.

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rwise appropriated, and to be expended under the

TO RECAPITULATE.

We contend:—

First. That Lock and Dam No. 7 is a lawful structure, and lawfully the property of the Monongahela Navigation Company; made so by contract with Congress, under which it was built. Such property cannot be taken without just compensation, and such contract cannot be violated or impaired.

Second. Such improvement, even if built under State authority alone, is lawful, if it conflicts with no Act of Congress. There is no Act of Congress with which it conflicts,—not even the Appropriating Act.

Third. In the Appropriating Act, Congress has recognized our lawful property in the structure. It is not now for it to establish the measure of the value of the structure, but full value, or "just compensation" must be paid upon its appropriation; and such value cannot be ascertained without considering the income produced by its use under the right of the Navigation Company to charge tolls.

Fourth. Even if such structure were built under State authority alone, without arrangement with Congress, and, even if Congress had not recognized the property of the Company in it, yet, having been constructed *as an aid* to commerce, and having actually created and developed *a free commerce*, open, without restriction, to all navigators, Congress has no constitutional power to interfere.

Wayne MacVeagh
John McClure

APPENDIX.

ACTS OF CONGRESS REFERRED TO IN *ARGUMENT.*

ACT OF MARCH 3, 1881,
U. S. Statutes at Large, vol. 21, page 471.

"*Be it enacted, &c.:*

That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, and to be expended under the direction of the Secretary of War, for the construction, completion, repair, and preservation of the public works hereinafter named;

* * * * * * * * *

Improving Monongahela River, West Virginia and Pennsylvania, twenty-five thousand dollars; but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven, at Jacob's Creek, and until said Company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

ACT OF CONGRESS OF AUGUST 2, 1882,
U. S. Statutes at Large, vol. 22, p. 207.

"*Be it enacted, &c.:*

That the following sums of money be, and are hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated, and to be expended under the

direction of the Secretary of War, for the construction, completion, repair and preservation of the public works hereinafter named:

* * * * * * * * *

Improving Monongahela River, West Virginia. Continuing improvement, twenty-five thousand dollars."

ACT OF JULY 5, 1884,

U. S. Statutes at Large, vol. 23, p. 139.

"*Be it enacted, &c.:*

That the following sums of money be, and are hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated, and to be expended under the direction of the Secretary of War, for the construction, completion, repair and preservation of the public works hereinafter named:

* * * * * * * * *

Improving Monongahela River, West Virginia: Continuing improvement, forty-five thousand dollars. * * "

ACT OF AUGUST 5, 1886,

U. S. Statutes at Large, vol. 24, p. 318.

"*Be it enacted, &c.:*

That the following sums of money be, and hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated, and to be expended under the direction of the Secretary of War, for the construction, completion, repair and preservation of the public works herein named:

* * * * * * * * *

Improving Monongahela River, Pennsylvania and West Virginia: Continuing improvement, ninety thousand nine hundred dollars; but no charges or tolls shall be collected on any other part of the river on any commerce on said river which originates above the works herein appropriated for. * * * * * * *

The Secretary of War is hereby authorized and directed to ascertain the value and commercial importance of the works and property of the Green and Barren River Navigation Company, situate on the Green and Barren Rivers, in the State of Kentucky, and of the Monongahela Navigation Company, situated on the Monogahela River, in the State of Pennsylvania; and in order to acquire such information, the Secretary of War shall appoint a board of three competent engineers from the Engineer Corps of the United States Army, which board shall in each case report to the Secretary of War, who shall report thereon to Congress at its next succeeding session; and the cost of such examination shall be paid out of the sum appropriated by this Act for surveys. *Provided*, That nothing herein shall be construed as committing Congress to the purchase of said works."

ACT OF AUGUST 11, 1888,

U. S. Statutes at Large, vol. 25, p. 410.

"*Be enacted, &c.*

That the following sums of money be, and hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated, and to be expended under the direction of the Secretary of War, for the construction, completion, repair and preservation of the public works hereinafter named:

* * * * * * * * *

Improving Monongahela River, West Virginia: To complete dam number eight, thirty-five thousand dollars; and for continuing improvements.

"The Secretary of War be and is hereby authorized and directed to negotiate for, and purchase, at a cost not to exceed $161,733,13, lock and dam number seven, otherwise known as the "upper lock and dam," and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the laws of Pennsylvania, which lock and dam number seven and its appurtenances constitute a part of the improvement in water communication in the Monongahela River, between Pittsburgh, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia. And the sum of $161,733,-13, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, for consummating said purchase, the same to be paid on the warrant of the Secretary of War, upon full and absolute conveyance to the United States of the said lock and dam number seven, and its appurtenances of the said Monongahela Navigation Company.

In the event of the inability of the Secretary of War to make voluntary purchase of said lock and dam number seven and its appurtenances, for said sum of $161,733.13, or a less sum, then, the Secretary of War is hereby authorized and directed to institute and carry to completion proceedings for the condemnation of said lock and dam number seven and its appurtenances, said condemnation proceedings to be as prescribed and regulated by the provisions of the general railroad law of Pennsylvania, approved February 19th, 1849, and its supplements, except that the United States shall not be required to give any bond, and except that jurisdiction of said proceedings is hereby

given to the Circuit Court of the United States, for the Western District of Pennsylvania, with right of appeal by either party, to the Supreme Court of the United States: *Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to pay the necessary costs of said condemnation proceedings; and upon final judgment being entered therein, the Secretary of War is hereby authorized and directed to draw his warrant on the Treasury for the amount of said judgment and costs, and said amount for the payment thereof hereby appropriated out of any moneys in the Treasury not otherwise appropriated. And when said lock and dam number seven and its appurtenances shall have been acquired by the United States, whether by purchase or condemnation, the Secretary of War shall take charge thereof, and the same shall thereafter be subject to the provisions of Section 4 of an Act entitled: 'An Act making appropriations for the construction, repair and preservation for certain public work on rivers and harbors, and for other purposes,' approved July 5th, 1884."

ACT OF SEPTEMBER 19, 1890.

U. S. Statutes at Large, vol. 27, p. 438.

"*Be it enacted*, &c.:

* * * * * * * * *

That whenever the proceedings commenced by the United States against the Monongahela Navigation Company, a corporation organized under the laws of Pennsylvania, to condemn lock and dam number seven, constituting

a part of the improvement in water communication in the Monongahela River, between Pittsburgh, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia, shall be finally determined, and the United States shall have acquired the title to said lock and dam number seven and its appurtenances, the Secretary of War, be, and he is hereby authorized and directed to negotiate for and purchase at a cost not to exceed one hundred and sixty-two thousand dollars, lock and dam number six and its appurtenances, of the Monongahela Navigation Company, also constituting a part of said improvement. And the sum of one hundred and sixty-two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the Treasury not otherwise appropriated. for consummating said purchase, the same to be paid on the warrant of the Secretary of War, upon full and absolute conveyance to the United States, of the said lock and dam number six and its appurtenances of the said Monongahela Navigation Company. In the event of the inability of the Secretary of War to make voluntary purchase of said lock and dam number six for said sum of one hundred and sixty-two thousand dollars, or a less sum, then the Secretary of War is hereby authorized and directed to institute and carry to completion, proceedings for the condemnation of said lock and dam number six and its appurtenances, said condemnation proceedings to be as prescribed and regulated by the provisions of the general railroad law of Pennsylvania, approved, February nineteenth, eighteen hundred and forty-nine, and its supplements, except that the United States shall not be required to give any bond, and except that jurisdiction of said proceedings is hereby given to the Circuit Court of the United

States, for the Western District of Pennsylvania, with right of appeal by either party to the Supreme Court of the United States: *Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, to pay the necessary costs of said condemnation proceedings; and upon final judgment being entered therein, the Secretary of War, if in his opinion the judgment is reasonable, is hereby authorized and directed to draw his warrant on the Treasury for the amount of said judgment and costs, and said amount for the payment thereof is hereby appropriated out of any moneys in the Treasury not otherwise appropriated. And when said lock and dam number six and its appurtenances shall have been acquired by the United States, whether by purchase or by condemnation, the Secretary of War, shall take charge thereof, and the same shall thereafter be subject to the provisions of section four of an Act entitled: 'An Act making appropriations for the construction, repair and preservation for certain public work on rivers and harbors and for other purposes,' approved July fifth, eighteen hundred and eighty-four."

148 U.S. 312

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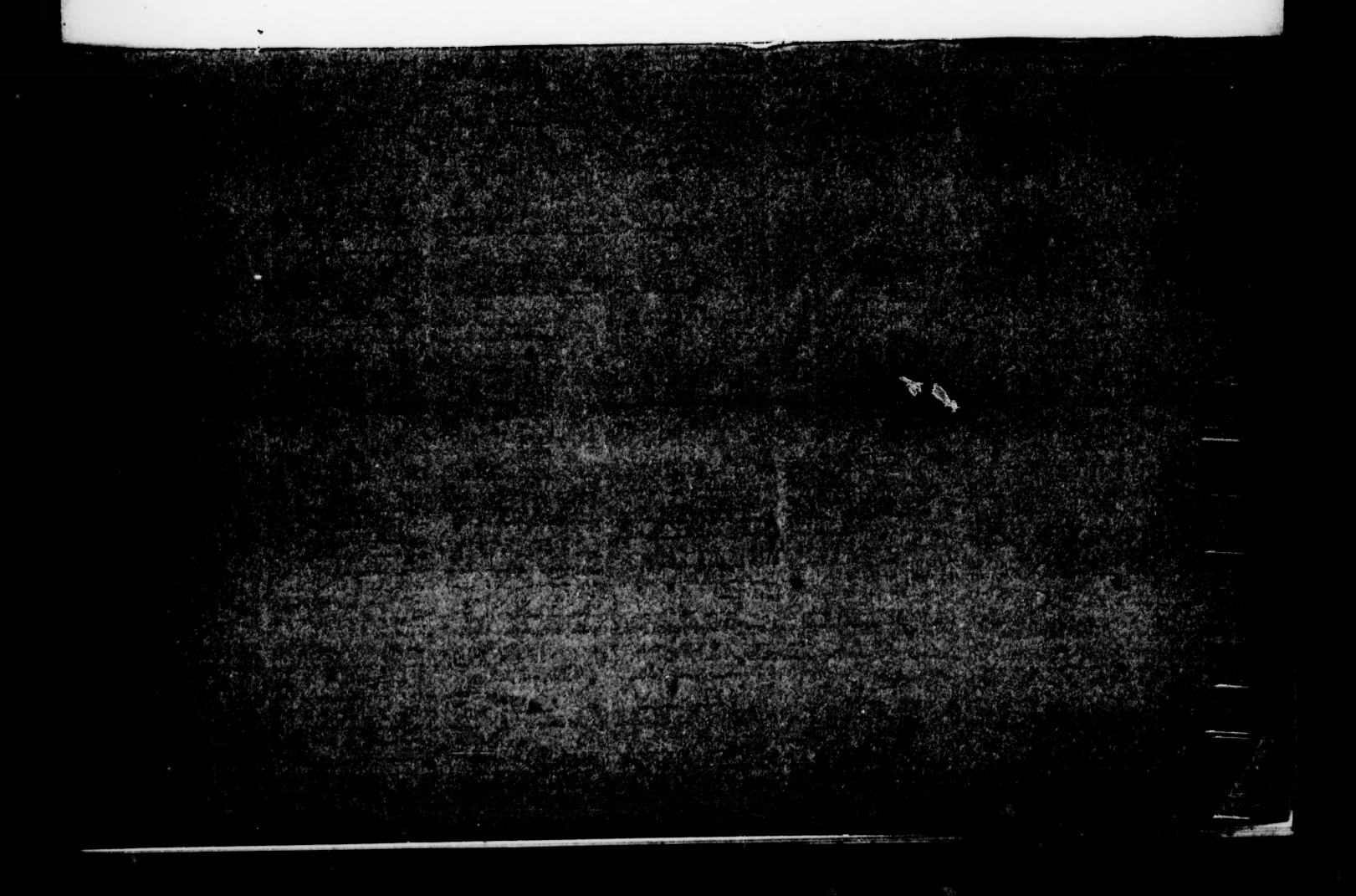
In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE MONONGAHELA NAVIGATION Company
vs.
THE UNITED STATES.
} No. 722.

FROM THE WESTERN DISTRICT OF PENNSYLVANIA.



In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE MONONGAHELA NAVIGATION Company
vs.
THE UNITED STATES. } No. 722.

FROM THE WESTERN DISTRICT OF PENNSYLVANIA.

By the river and harbor bill which became a law on the 10th day of August, 1888, the clear intention of Congress to extinguish, either by purchase or condemnation, the title of the appellant to a certain lock and dam (No. 7) and its appurtenances in the Monongahela River, is expressed. In the act of Congress (25 Stats. L., p. 411) the Secretary of War is authorized and directed to negotiate for and purchase, at a cost not to exceed $161,733.13, said lock and dam, known as the "upper lock and dam," and its appurtenances, of the Monongahela Navigation Company, said lock and dam constituting a part of the improvement in water communication in the Monongahela

River between Pittsburg, Pa., and Morgantown, W. Va. An appropriation of the amount named was made for such purchase.

The act further provides that in case such purchase is found to be impracticable with the sum named, then the Secretary of War is authorized and directed, by proceedings under the general railroad law of Pennsylvania, to condemn said property to the use of the United States, in the circuit court for the western district of Pennsylvania. By a proviso in the act it is directed that "in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated."

The principal question at bar is the validity of this last-named provision. This question was raised in various forms upon the trial, the contention of the appellant being that the franchise is no less property than the material structure of the lock and dam, and that therefore the same can not be taken or destroyed by the Government, directly or indirectly, without compensation. On behalf of the Government, on the contrary, it was claimed by the district attorney, and held by the court, that the right of the United States to regulate and absolutely control the navigation of the Monongahela River was supreme and paramount; that it was not within the power of the State to grant to any corporation or persons a franchise in, or connected with, the navigation of said river which was not wholly subordinate to the rights of the United States; that any franchise granted by the State had, as matter of law, necessarily within it, as a condition, that it might be

terminated at any time by an act of the United States, and that therefore no injury entitled to compensation and damages could accrue to any party claiming such franchise by reason of the exercise of such paramount right by the General Government.

It is true that the first assignment of error (Transcript, p. 77) is based on a much more radical view, viz., that the Government of the United States has no power to condemn any of this property, whether lock, dam, or franchise; but it is not believed that a proposition so entirely at variance with the decisions of this court as to the constitutional power of Congress will be seriously insisted upon. At least until the argument of appellant upon this question is presented we shall spend no time upon it.

I.

Has the appellant, as against the United States, a vested property in the franchise to maintain and take toll for the use of this lock and dam? By clause 3, section 8, Article 1, of the Constitution, there is vested in Congress power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Under this grant the authority of Congress to control the navigation of all streams which are highways of commerce between the States has been uniformly asserted by Congress and never successfully denied in the courts. It is true there are numerous decisions upholding the exercise of a regulating power over such channels of commerce by the States, but in every case it has been admitted that such exercise could be upheld only because and so long as Congress failed to assert its jurisdiction.

It is presumed that it will not be questioned by appellants that the Monongahela River, at the point under discussion, was a navigable channel of interstate commerce. Certainly such a contention could not be successfully maintained.

(*Escanaba Company* v. *Chicago*, 107 U. S., p. 678; *Barney* v. *Keokuk*, 94 U. S., p. 324; *The Montello*, 20 Wallace, p. 430; *The Gennessee Chief* v. *Henry Fitzhugh et al.*, 12 Howard, p. 443; *Bridge Co* v. *United States*, 105 U. S., 479.)

In the case first above cited, the law upon this subject is succinctly stated on page 682, as follows:

> The power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries. (*The Daniel Ball*, 10 Wall., 557.) Such is the case with the Chicago River and its branches. The common-law test of the navigability of waters, that they are subject to the ebb and flow of the tide, grew out of the fact that in England there are no waters navigable in fact or to any great extent which are not also affected by the tide. That test has long since been discarded in this country. Vessels larger than any which existed in England when that test was established now navigate rivers and inland lakes for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to the bed of the stream, as in some States it governs in that matter.

> The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

In the same case, on page 683, after stating that in the absence of legislation by Congress on the subject, the States have full authority to establish upon and along such rivers, roads, canals and bridges and ferries, it is said:

> When its power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal Government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land.

In that case it was accordingly held that a bridge constructed by the city of Chicago over the Chicago River necessary for the street traffic, and not unnecessarily obstructing the navigation of the river, was not a nuisance and might be continued.

So, in the Bridge Company against the United States (105 U. S. R., p. 479), Chief Justice Waite, speaking for the court, upon a similar question, says:

> The power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme and overrides all that the States may do. When, therefore, Congress in a proper way declares a bridge across a navigable river of the

> United States to be an unlawful structure, no legislation of a State can make it lawful. Those who act on State authority alone necessarily assume all of the risks of legitimate Congressional interference.

This case is instructive, not only in the clearness of the opinion of the Chief Justice, speaking for the majority of the court, but the dissenting opinions bring out with more distinctness the points decided.

The attitude of this court upon this question also well appears in *Gilman* v. *Philadelphia* (3 Wallace, p. 729), opinion by Mr. Justice Swayne. In that case the authority of the city of Philadelphia to erect a permanent bridge over the Schuylkill River, under an act of the legislature of Pennsylvania, was in issue. The court said:

> The States have always exercised this power, and from the nature and objects of the two systems of Government they must always continue to exercise it, subject, however, in all cases to the paramount authority of Congress whenever the power of a State shall be exerted within the sphere of the commercial power which belongs to the nation.

The same doctrine is found in a most elaborate opinion by the late Mr. Justice Bradley in the *Willamette Iron Bridge Company* v. *Hatch* (125 U. S., p. 12). Speaking of the power of the legislature to authorize the construction and maintenance of such a bridge in the absence of Congressional legislation, he says:

> We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the

States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, viz, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land: but, in many, perhaps the majority, of cases, its assent only is asked, and the primary authority is sought at the hands of the State. (*County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697, 699). (See also *Stockton* vs. *Baltimore, &c.*, 32 Fed. Rep., 16.)

II.

Assuming as proven that in Congress resides the ultimate and paramount power to control the navigation of all streams which are highways of interstate commerce, and to remove any obstruction to such commerce erected by the authority of a State, the very important question arises, by whom is the question whether such structures are obstructions to commerce to be determined? In other words, by what tribunal is the necessity for the interposition of Congress to be ascertained? It is very clear upon principle that this power can reside nowhere except in Congress. The power to regulate interstate commerce

necessarily involves the widest latitude in the methods of such regulation and the determination of the occasions for its exercise. To say that Congress has this power, but can only exercise it when some other tribunal determines the necessity of such exercise, is to practically annihilate the power. But fortunately we are not without direct authority upon this question.

The right of the Federal courts to exercise such a power is, in the Willamette Bridge case, as well as the Escanaba Bridge case and the other cases cited, clearly negatived. It was contended in these cases that, in the absence of special legislation by Congress with reference to the particular subject-matter, inasmuch as the streams in controversy were channels of interstate commerce, it was competent for the Federal courts, in the exercise of a jurisdiction over Federal questions, to adjudge such structures to be unlawful; but this court held otherwise.

Nor is this all. In *Gilman* v. *Philadelphia* (*supra*) it is expressly held that Congress must determine for itself when and to what extent its power in the premises shall be brought into requisition. On page 724 the court says:

> Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation interposed by the State or otherwise; to remove such obstructions when they exist,

> and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the national Constitution and which have always existed in the Parliament in England.
>
> *It is for Congress to determine when its full power shall be brought into activity and as to the regulations and sanctions which shall be provided.*

In *Martin* v. *Mott* (12 Wheat., p. 19) it was sought to contest in court the determination of the President of the United States as to the existence of an exigency demanding a call of the militia into active service for the suppression of an insurrection. It was held that the question was not open to discussion in the courts. On page 31 of the opinion Mr. Justice Story says:

> Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.

A like decision upon the same question, arising in a similar way, was made in *Luther* v. *Borden* (7 Howard, p. 43).

It will hardly be contended that upon a grant of a like power to Congress a narrower construction is to prevail. Indeed, that Congress is the sole judge as to how, when, and where it will execute this power is a proposition too clear for serious argument.

III.

The foregoing propositions being established, the maintenance of appellant's contention that it has in this franchise a vested property as against the United States is impossible. The truth is that in condemning and paying the appellant for its material improvements Congress makes a concession which could not have been enforced by law. It was entirely competent for Congress to have enacted and enforced a law forbidding the collection of any further tolls by this corporation as being an unlawful obstruction or interference with interstate commerce, making in said law no provision whatever for any payment to the owners of the property. It has not, however, seen fit to enforce the extreme legal rights of the Government, but recognizing the large expenditures of money made by this company, and the equity growing out of such expenditures, provision has been made for the reimbursement of all such expenditures.

This is not, however, done in recognition of a legal right, but of a moral equity. (See opinion of Miller, J., in *Bridge Co.* vs. *United States*, *supra*.) Certainly, however, out of the same circumstance there does not arise any obligation on the part of Congress to pay this corporation the possible or probable profits which it might in the future realize from the continued exercise of this privilege or franchise to levy a tax upon interstate commerce or to obstruct one of the highways of such commerce. If this company has a right to demand pay for its franchise, then any person or corporation obtaining a grant of a franchise from a State to be exercised upon any channel

of interstate commerce can enforce a similar right, and it is quite immaterial whether such grant has been obtained in the past or shall be obtained in the future. It certainly can not be maintained that, because Congress has never asserted its paramount right to control the navigation of this stream, therefore, by prescription or use or in any other way, this corporation has obtained a vested right in the premises.

Such a proposition is scarcely less absurd than that other proposition, recently proclaimed in a high place, that the employés of a manufacturing corporation, having worked for that corporation for a considerable time, have obtained the vested right in the nature of a lien to be continued in such employment. Appellant's contention amounts to this, that, if A obtained from a State a franchise to run a toll bridge over a highway of interstate commerce, it is not competent for Congress to cause the removal of such bridge as an obstruction to such commerce, without an ascertainment and payment to A of all the profits that he might reasonably expect to make from the tolls of such bridge in all future time. The statement of the proposition is its own refutation, and its absurdity is apparent without argument.

If authority were needed it is submitted that it is found in the decisions of this court. In the case of *Veazie Bank* vs. *Fenno* (8 Wall., 543, 547), it was said that the Federal Government had power to tax franchises granted by the State, and, necessarily, property created or contracts made and issued under the franchise. The power to tax is a power to destroy; it was urged that the tax was so

excessive as to evince an intent to that end. This court announced that—

> The judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but the people by whom its members are elected.

The State banks were taxed out of existence. Here full compensation is made for all that the defendants then had, viz, the property, exclusive of the franchise. The latter was never absolute, but was conditioned in effect to terminate when Congress asserted the paramount right of the United States.

Upon the passage of the act of August 10, 1888, and commencement of proceedings thereunder, the franchise ended and no property was taken. The *proviso* complained of adds nothing to the act, and might as well have been omitted.

The measure of damages would have been the same without as with it.

IV.

But not only is the demand for compensation on account of the destruction of this franchise unfounded as against the United States; such a demand could not be maintained even against the State of Pennsylvania. In the legislation constituting the charter of appellant, through which alone it obtains any rights in the premises, the State distinctly reserved the option to take possession of

this property upon payment of the cost of material improvements and expenses with 6 per cent interest less dividends. Section 18 of the charter of the Monongahela Navigation Company, approved February 18, 1836, found on page 36 of the transcript, in this case reads as follows:

> It shall be lawful for the Commonwealth, at the end of twenty-five years from the completion of the work hereby authorized, to purchase the improvements made in pursuance of this act, by paying to the company the original cost expended in the improvements and the subsequent expenses, together with six per cent interest thereon, deducting from the sum of principal and interest aforesaid the dividends before declared by the said company on the capital stock, and on the payment thereof by the Commonwealth to the said company, in such manner and form as shall be agreed upon by the said company and by agents duly authorized by the Commonwealth, all and singular the improvements aforesaid, with its appurtenances, water rights, and privileges, shall be vested in the Commonwealth, and the privileges and corporate rights hereby granted will thereupon cease and determine, excepting so far as the same may be necessary in the settlement of the concerns of said company.

Section 8 of the act supplemental thereto, approved June 24, 1839, found on page 39 of the transcript, is in the following language:

> In case the Commonwealth should at any time purchase the improvement, made in pursuance of this act and the act to which this is a supplement, then the Commonwealth shall pay the company such sum or sums of money as, together with the next dividends, shall amount to the expense incurred in constructing

said improvements and keeping it in repair, with eight per cent per annum interest thereon.

In view of these enactments, it is clear that this corporation has no contract with the State of Pennsylvania for an unlimited franchise. Its property is always subject to be taken by the State as provided in the sections quoted. Much less can appellant demand compensation for the franchise from the Government of the United States, with which it has no contract in the premises, and which is simply exercising a paramount authority derived directly from the Constitution of the United States, the supreme law of the land.

V.

It is said that by the act of March 3, 1881 (21 Stats., 471), Congress has impliedly recognized and confirmed a vested right in the premises. The language of that act is as follows:

> Improving Monongahela River, West Virginia and Pennsylvania, $25,000; but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven, of Jacobs Creek, and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same.

That upon notice of said last-recited legislation the corporation passed resolutions accepting and acting upon the same, said corporate resolutions being in the following words:

> Whereas Congress has made an appropriation for the commencement of the building of lock and dam number eight, in the Monongahela River, the pay-

ment of which appropriation is made to depend upon the Secretary of War being satisfied of the *bona fide* intention of this company to construct lock and dam number seven, and of their financial ability to complete the same; and

Whereas Col. Merrill, of the U. S. Engineers, in charge of the Government improvement of the Monongahela River, has requested this company to furnish the Secretary of War with satisfactory assurances in relation thereto: Therefore

Resolved, That it is the *bona fide* purpose and intention of this company to construct lock and dam number seven, in the Monongahela River, in the manner and at the time required of them by the acts of assembly of the State of Pennsylvania—that is to say, so to complete said lock and dam number seven that the same shall be ready for use as soon as the requisite locks and dams above lock and dam number seven constructed or about to be constructed by the Federal Government shall also be finished and ready for use, so as to complete the slack water of said river from Pittsburg, Pennsylvania, to Morgantown, Virginia.

Resolved, That the secretary of this company be directed to forward a copy of the foregoing resolution, together with copies of the company's annual report showing the intention of the company and their ability to complete this work, to Colonel Merrill, and also to the Secretary of War.

That upon notice of such resolutions having been given to the Secretary of War, a letter from an officer of Engineers of the United States Army in charge of the improvements of said river, was received in the following words:

I have just received official notice from the Secretary of War, through the Chief of Engineers, that

> the resolution and documents relative to the construction of lock and dam No. 7 on the Monongahela River, forwarded to this office by your company in April last (duplicates sent to the honorable Secretary of War), have been considered as fully meeting the requirements of the proviso in the last appropriation for the improvement of the above named river prohibiting the expenditure of the money appropriated "until the Monongahela Company shall have undertaken in good faith the building of look and dam No. 7, at Jacob's creek, and until said company shall, in a manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."
>
> I have been officially directed to notify your company of this decision of the Secretary of War.
>
> The only obstacle now remaining to prevent immediate work at the mouth of Dunkard is the necessity of waiting until the land is purchased and paid for. This matter is yet in the hands of the Attorney-General, and I am compelled to wait his action.

Thereupon the construction of said lock and dam No. 7 was begun in 1882 and completed in 1884. Under these circumstances it is claimed that the work has been sanctioned by Congress, and that such sanction can not now be recalled without compensation, not only for the work done, but for the franchise involved.

To this proposition there are two very ready answers. First, the legislation of 1881 does not by its terms amount to a contract between the Government and appellant in the premises. In the *Bridge Company* v. *The United States* (105 U. S., *supra*) it is said:

> Congress, which alone exercises the legislative power of the Government, is the constitutional pro-

> tector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the Government.

There is certainly here no express contract, nor does it "manifestly appear" that it was the intention of Congress to divest itself of any part of its continuing discretionary power in the premises. The effect of this statute of 1881 making the appropriation, and of all that was done by the executive officers thereunder, was simply to grant a revocable license. If the appropriation in the same words were for a structure on ground owned by the Government it would not amount to a perpetual lease, nor here is it a grant of a perpetual franchise. And yet it must be perpetual if a franchise at all. There is no time named. If not perpetual, for how long is the franchise, if a franchise it be?

We submit Congress can no more be bound to concede a franchise by this statute than it could be bound by an estoppel, if with full knowledge it stood by while this or any other company expended money on such a work.

No franchise could be brought into existence in either case; the utmost equity that could arise in a court of morals would be for a reimbursement of actual expenditures, and for that provision is made in this case. In a case of this kind justice to the public as well as to the in-

dividual must be done. (*Searl* vs. *School District*, 133 U. S., 553; *Gamon* vs. *New York*, 21 Wall., 196; *Kohl* vs. *U. S.*, 91 U. S., 367.)

Moreover, if it were necessary to resort to that doctrine, nothing is better settled than that it is incompetent for a legislature to barter away or conclude itself in the exercise of any constitutional grant of legislative power. The grant is not to one Congress nor to another Congress. It is not a grant of a power to contract. It is not an authority to be exercised at one time or at another time, once for all; but it is a grant of a continuing legislative power, which Congress can not at one session or on one day debar itself from exercising at any time in the future. It is a grant for the benefit of the people of the entire nation, to be exercised by Congress so long as the Constitution exists, when an exigency occurs calling for the exercise of such power. To hold otherwise would make it possible for Congress to contract away all its legislative powers.

If, under such a power, Congress may grant one irrevocable franchise, it may grant any number not inconsistent with each other. If it may do this upon one channel of commerce, it may upon all, and the result, as before stated, would be the destruction of the power as a legislative power. That this can not be done is clear not only upon principle but upon authority. The citations in the fourth edition of Dillon on Municipal Corporations, volume 1, section 97, leave no room for doubt upon this point.

Indeed this court has expressly said that "Congress can exercise legislative power only." (*Bridge Co.* vs. *U.*

S., 105 U. S., 480.) It is elementary that legislative power can not be fettered by the legislature in which it is vested by grant, by and for the benefit of all the people of all the States.

But whatever may be claimed to be the law elsewhere it is firmly settled by a long line of decisions in Pennsylvania that the right of the Navigation Company in the case at bar is a mere revocable license. Lewis, on Eminent Domain (sec. 75), says:

> It has been repeatedly held in Pennsylvania that where a dam has been built on a public navigable stream under an act of the legislature granting permission to do so, the grant is a mere license, revocable at pleasure, and that where such dam is injured or destroyed by reason of other improvements in or upon the stream by the legislature, no compensation need be made.

Indeed, one of the clearest and earliest decisions to this effect was made at the instance and in favor of the Monongahela Navigation Company, the very party here asking a different rule to be enforced. (*Monongahela Navigation Company* v. *Coons*, 6th W. & S., 101.)

In the *Susquehanna Canal Company* v. *Wright* (9, W. & S., 9, p. 13), Chief Justice Gibson, speaking for the court, says:

> He (the grantee of a right to erect a dam) was bound to know that the State had power to revoke its license whenever the paramount interests of the public should require it, and in this respect a grant by a public agent of limited powers, and bound not to throw away the interests confided to it, is different from a grant by an individual who is master of the

> subject. To revoke the latter after an expenditure in the prosecution of it would be a fraud, but he who accepts a license from the legislature knowing that he is dealing with an agent bound by duty not to impair a public right, does so at his risk, and a voluntary expenditure on the foot of it gives him no claim to compensation.

The same doctrine has been repeatedly enforced in Pennsylvania (*N. Y. & E. R. R. Co.* v. *Young*, 33 Pa. St., 175; *McKean* v. *Delaware Div. Canal Co.*, 49 Pa. St., 424; *Freelan* v. *Pa. R. R. Co.*, 66 Pa. St., 91; *Bailey* v. *P. W. & B. R. R. Co.*, 4 Har. Del., 389); and this court in *Rundell* v. *D. & R. Canal Co.* (14 Howard, 80) also enforced this doctrine as the settled law of Pennsylvania. Surely if such is the law when invoked in behalf of the State or of a corporation, the creature of the State, it is not less the law when necessary to the vindication of the paramount right of the National Government to regulate commerce under the Constitution.

It would not be safe to say that, under the grant to regulate interstate commerce, Congress has all the power over navigable streams originally inherent in the State. The power of Congress is a granted power. The power of the State was an inherent power. The power of Congress is ample and supreme for all the purposes of commerce, but, as in case of a municipal corporation, the power can only be used with reference to the subject-matter of the grant, and with reference to that subject-matter its action cannot be questioned. If the State, in the exercise of its original inherent sovereign power, might have made a contract with reference to this subject-

matter, it by no means follows that Congress might do the same thing. On the other hand, it seems entirely clear, upon the authorities above cited, that Congress could not make such a contract, and thus bargain away its legislative power.

In the brief for the appellant much stress appears to be laid upon the fact that it does not appear that Congress has made a distinct finding that this lock and dam, and the tolls exacted for the use of same, operate as an obstruction to the free navigation of the river. To this it is a sufficient answer to say that the action of Congress, within the scope of its authority, established a conclusive presumption of the existence of the facts calling for such action. (*Martin* v. *Mott, supra; Luther* v. *Borden, supra; Anderson* v. *Dunn*, 6 Wheat., 234.) The rule is similar to that which, in favor of the action of a court, presumes, jurisdiction being established, that everything else was done regularly, and the facts necessary to uphold the decree or judgment were found. (*Miller* v. *United States*, 11 Wall., 300.) There is, however, this difference, that, in favor of the action of the Legislature or the Executive in such a case, the presumption is conclusive.

In conclusion, we submit that the power of Congress over this subject-matter is plenary.

In re *Repier* lottery case (143 U. S., p. 134) this court said:

> The States, before the Union was formed, could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoral-

izing influence upon the people. When the power to establish post-offices and post-roads was surrendered to Congress it was a complete power, and the grant carried with it the right to exercise all the powers which made that power effective.

Under this grant, unless crippled by an irrevocable contract, Congress might have destroyed this lock and dam; or it might have forbidden the taking of any tolls for the use of the same. In short, its authority to act in the premises was supreme. And this notwithstanding the dire consequences which, according to the brief for the appellants, might result in the premises. The mere fact that instead of thus destroying the investment, Congress has authorized the payment for actual outlays, can certainly afford no justification for the courts either to deny the existence or attempt to direct the use of this sovereign legislative power.

The action of the circuit court should be affirmed.

W. H. H. MILLER.
Attorney-General.

CHARLES H. ALDRICH,
Solicitor-General.

○

148 U.S. 312

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RECORD CASE No 14,589

IN THE

Supreme Court of the United States.

No. 1122 OCTOBER TERM, 1891.

Appeal from and in Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

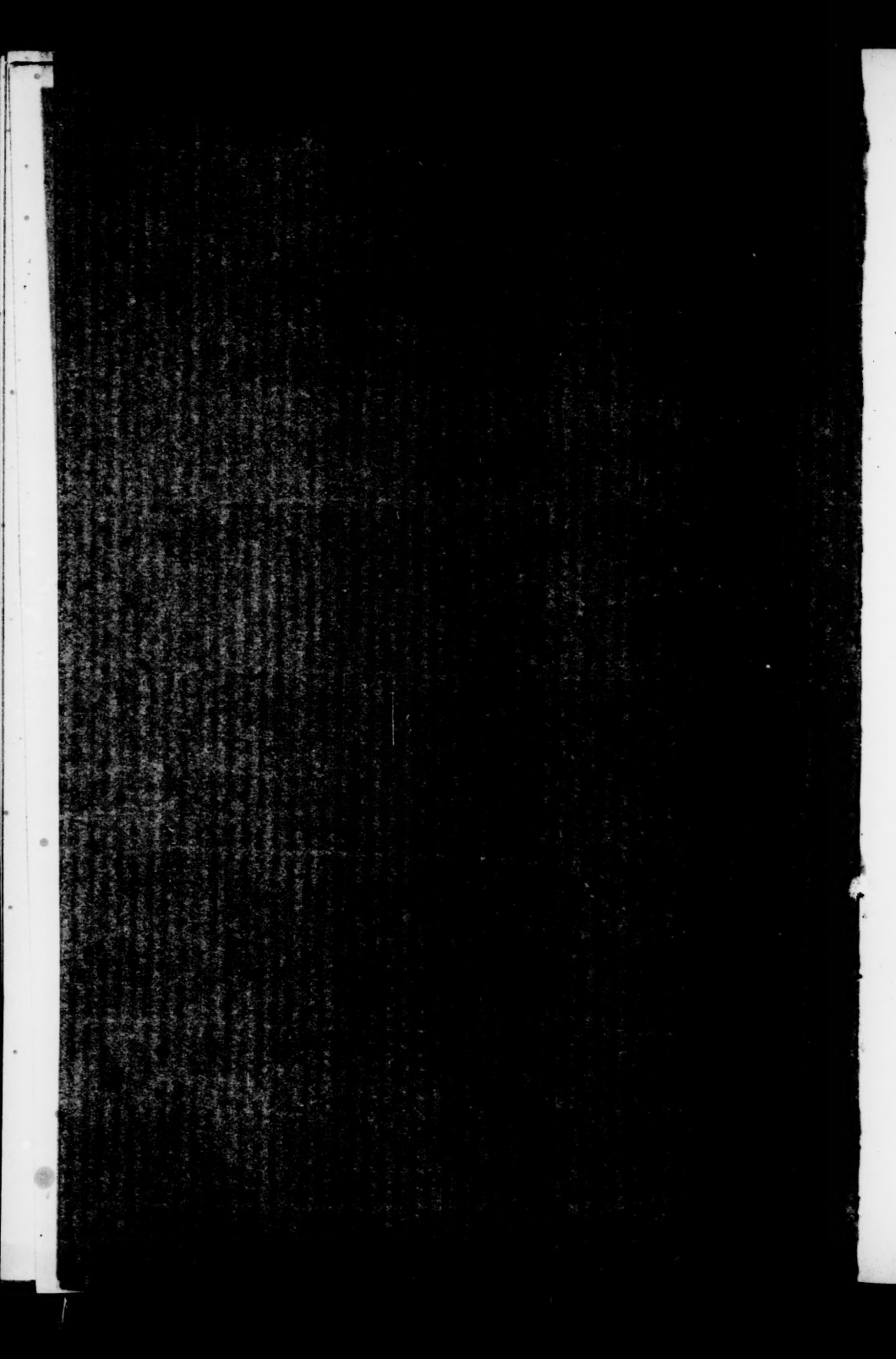
THE MONONGAHELA NAVIGATION COMPANY
APPELLANT AND PLAINTIFF IN ERROR,

VERSUS

THE UNITED STATES.

BRIEF ON BEHALF OF THE APPELLEE.

C. NEWELL,
KNOX & REED,
D. T. WATSON,
Attorneys.



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STATEMENT.

[References are to pages of the printed Record.]

In 1836 the State of Pennsylvania incorporated and by Acts in that and subsequent years granted to the Monongahela Navigation Company the right

> "To enter upon the said river Monongahela and upon the lands on either side, and to use the rocks, stone, gravel or earth which may be found thereon in the construction of their works * * * * and to form and make, erect and set up any dams, locks or any other device whatsoever which they shall think most fit and convenient, to make a complete slack-water navigation between the points herein mentioned, to wit: the City of Pittsburgh and the Virginia State line."

The corporation was made perpetual and given the right to charge tolls, which, over and above all expenses, would net twelve (12) per cent. per annum.

The company did enter upon and take actual possession of the river from Pittsburgh to the Virginia State line, and erected entirely across it, seven dams, and is now in the sole and exclusive control of said river.

In 1869 Pennsylvania granted to the Navigation Company the power to widen, straighten, deepen, enlarge and otherwise improve the whole of their slack water navigation and make new feeders—(59.)

The Monongahela river rises in West Virginia, flows into Pennsylvania, and, uniting with the Allegheny river at Pittsburgh, forms the Ohio. The Monongahela was navigable in its natural condition and before 1836.

As the offer made by the Navigation Company below (17, 18) shows, it waxed fat on the profits from so rich a grant. It declared and paid dividends at the rate of twelve (12) per cent. per annum, and these dividends naturally increased the market value of its stock from its par of fifty dollars ($50.00) to one hundred dollars ($100.00) per share. It levied tolls on every ton of traffic, every boat or vehicle of commerce, that passed up or down the river. The United States increased its custom by improving the navigation of the river in West Virginia.

So large a burden paid by those who used the river tended to embarrass, not increase, inter-state commerce. Marvellous as its natural increase was and its present growth is, the heavy tribute it pays to the Navigation Company of necessity tends to retard it. All the coal from the greatest bituminous coal field of the world pays, and must so long as it lasted pay

tribute to this state control. And for what—not some great public use, but for private corporate gain. No wonder those interested in the mining of and transportation of this coal to the people of the Western and Southern States, and those buying and using this coal, complained, and especially as the United States had improved and made free the navigation of the Little Kanahwa and other streams, and their beds of coal entered the market in competition with that of the Monongahela valley.

Not only the coal but the business interests of Pittsburgh, the greatest manufacturing city of the United States, are involved, for the traffic to and from the many large manufacturing plants on either side of the Monongahela is also tolled by this wealthy monopoly.

To relieve this State control of commerce and navigation and give the coal and manufactured products of the Monongahela valley in Pennsylvania and Virginia free transportation to market, Congress passed the Act of 1888, for the purchase or condemnation of lock and dam No. 7, and the Act of 1890, for the purchase and condemnation of lock and dam No. 6, with a distinct provision that when purchased or condemned they were to be free—no tolls charged for their use.

Congress did not, as it might have, condemned as antiquated and unsuited to its own system of dams, these locks and dams of the Navigation Company.

It did not turn to the Navigation Company's charter and give it, as it might have done, only the cost of its system, with interest, less its dividends as the State of Pennsylvania might do.

But it established a just and generous rule. Being unable to agree it submitted to the courts the actual value of the property taken, and this it must pay the Navigation Company. The Pennsylvania system of condeming property for railroad

purposes, which Congress adopted, gives to the property owner all the damages he sustains by the taking. (Act of February 19, 1849, *Pa. Laws*, page 83, section 11.) This the court below awarded the Navigation Company.

But the Navigation Company is unwilling to accept this, and fighting for the continued possession of this stream of the United States, and its right to levy tolls on the vastly increasing inter-State commerce, pleads that, it—a State corporation—has chartered State rights superior to the power of Congress, and, therefore, Congress cannot take its locks and dams, though these span and control a stream of the United States. And then it adds that even if Congress can take, it cannot do so until it pays to the Navigation Company the value of its State franchise to perpetually levy tolls on the commerce of the Monongahela river.

Whether Congress has the power to take these locks and dams, and, if so, whether it must pay the Navigation Company for its State franchise to take tolls, are the questions in this case.

POINTS OF LAW.

(I). The Monongahela Navigation Company is a corporation of the State of Pennsylvania. Since 1836 it has erected in the Monongahela river its locks and dams, including lock and dam (No. 7) number seven, by virtue of authority from the State of Pennsylvania, and not by virtue of any power or authority from the United States.

The court below at the request of the Navigation Company found: (See page 20, of the Record).

1st. That the Monongahela Navigation Company is a corporation of the State of Pennsylvania, created by the Act of March 31, 1836, and numerous supplements, *for the purpose of constructing and maintaining* an artificial navigation of the Monongahela river by means of looks and dams within the limits of the State of Pennsylvania, and with the right to collect tolls for the use of said locks and dams.

2d. *That in pursuance of the powers so granted by the State of Pennsylvania the said company has constructed seven dams*, each furnished with one or more locks, which form an existing system of navigation, extending from "lock and dam number one" at the city of Pittsburgh, to "lock and dam number seven," near the line between the State of Pennsylvania and West Virginia.

As only seven (7) dams in all were erected by the Navigation Company, and dam number seven (7) is the one whose condemnation is now under consideration, and as the Navigation Company averred and the court at its request found,

> "That in pursuance of the powers so granted by the State of Pennsylvania the said company has constructed seven (7) dams,"

it is incontrovertible that the power under which, and the authority by which, dam number seven was erected was received from the State of Pennsylvania.' No other source of power or authority is named. It was *the* State of Pennsylvania. Not *that* State and some other State or power—but the State of Pennsylvania *only*.

Nor do the findings number four (4) and five (5) change or impair this conclusion.

Number four (4) was: (page 21, of Record,)

> "That 'lock and dam No. 7' was constructed under and by virtue of the powers granted by the Act of March 31st, 1836, and its supplements, and particularly in pursuance of the Act of Assembly of the State of Pennsylvania, approved April 8, 1857, and which was in the following term."

Here follows the Act of 1857, which is as follows:

> "That whenever the construction of sufficient locks and dams to extend the slack water on the Monongahela river from the Pennsylvania State line to Morgantown in Monongalia county, Virginia, shall have been commenced it *shall be the duty* of the Monongahela Navigation Company to commence the construction of lock and dam number seven (7) in such manner and at such place as will extend the navigation from its present terminus to the Virginia State line and complete the same simultaneously with the completion of the work extending to Morgantown; that so much of all Acts heretofore passed as have reference to the time of completion of said improvement to the Virginia State line be and the same are hereby repealed."

To understand this Act of 1857 other portions of the charter of this Navigation Company should be read.

Section 17 of the Act of 1836 provided that unless work was commenced within five (5) years from the date of the Act and the navigation completed to the Virginia State line in seven (7) years thereafter, which seemingly carried it to 1848,

> "All the rights, privileges, liberties and franchises hereby granted to said company shall revert to the Commonwealth." (Page 36.)

Section 21 of the same Act further provided:

> "That the said company hereby incorporated be and they are hereby authorized and empowered to procure the right from the proper authorities of the State of Virginia to extend the said improvements from the Pennsylvania State line as far up as the said company may deem practicable: Provided, That the charter or grant shall be obtained from the said State of Virginia for the purpose aforesaid shall stipulate that no higher or other tolls or charges shall be made or exacted on so much of the said improvements as shall be located within the said State than are permitted to be charged by the provisions of this Act on that portion of said improvements which shall be located in the State of Pennsylvania, and in default of such stipulation within three years from the passage of this Act the legislature of this Commonwealth reserves the right to make such alterations and additions to the charter hereby authorized as may be deemed just and expedient." (Page 36.)

The eleventh (11) section of the supplement of 1839 extended the time for obtaining,

> "a charter or grant in the State of Virginia in relation to this improvement"

to March 31st, 1842. (page 39).

In 1843 the State of Pennsylvania extended the time for completion of the lock navigation for seven (7) years from the passage of the Act making it 1850. (Page 43).

Section 1 of the Act of January 25th, 1854, provided that the Navigation Company should do as follows: (page 54.)

Put lock and dam No. 5 under contract within sixty days and complete it by June 1st, 1855.

Put lock and dam No. 6 under contract within the year 1854, and complete it by December 1st, 1855.

> "And that a sufficient number of locks and dams to continue the improvement to the Virginia State line above lock and dam number six, shall be put under contract as soon as twenty-five thousand dollars shall be subscribed to the capital stock of said company * * * * and shall be completed within one year after said subscription is made; but in no event shall the completion of lock and dam above number six be delayed after the first day of December, eighteen hundred and fifty seven, but shall at said time be fully completed for all the purposes of navigation * * *."

When the Act of April 8th, 1857 was passed, the legislation, stood thus:

The Navigation Company must have completed navigation to the Virginia State line by December 1st, 1857.

The Act of April 8th, 1857, repealed

> "so much of all Acts heretofore passed as have reference to the time of the completion of said improvement to the Virginia State line,"

and provided inferentially (perhaps) that lock and dam number seven (7) need not be commenced until the construction of sufficient locks and dams to extend the slack water on the Monongahela river from the Pennsylvania State line to Morgantown, in Monongalia county, West Virginia, shall have been commenced.

And when so commenced *it should become the duty* of the Navigation Company to commence lock and dam No. 7 and finish them simultaneously with the Virginia improvement.

The power to build was derived from and the duty to build within a certain time was imposed by the State of Pennsylvania. The work to be done in Virginia did nothing but measure the time within which the Navigation Company was to begin and finish lock and dam No. 7.

The Navigation Company offered in evidence certain correspondence between Col. Merrill and General Moorhead of the Navigation Company, which began in 1878, some twenty-one years after the Act of 1857 was passed.

In the first letter (November 6th, 1878,) Col. Merrill says: (page 22.)

> "Understanding it to be *your* desire that the United States should build a lock and dam on the Monongahela river at or near the mouth of Dunkards creek in Pennsylvania,"

which was near the Virginia State line, he suggests the Navigation Company assign to the United States all its rights it may have to build the lock and dam and he then adds:

> "I would also request a formal agreement from your company to begin work on your own lock and dam No. 7, as soon as the United States shall begin work on the lock and dam in the vicinity of Dunkards creek."

General Moorhead answers this November 15, 1878, saying he will lay Col. Merrill's letter before his board, but assuring him the Navigation Company will agree to the suggestion of his (Merrill's) letter, and asks for forms of transfer.

November 25, 1878, Col. Merrill answers saying he has no special form.

Here the correspondence ends until 1881. Col. Merrill is not shown to have had any authority whatever to act for or bind the United States in the premises, and indeed he does not pretend to do so. His letters are merely suggestions and have no bearing on any of the questions in the present controversy.

In 1881 (March 24th) Col. Merrill again writes calling attention to the Act of Congress of 1881, and urges that the Navigation Company do undertake in good faith the erection of dam No. 7 and assure the Secretary of War of the same.

The Act of Congress referred to is a part of the River and Harbor bill and is as follows.

> "Improving Monongahela river, West Virginia and Pennsylvania, $25,000, but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam No. 7 at Jacobs creek, and until said company shall in manner satisfactory to the Secretary of War give assurance of their ability and purpose to complete the same."

This locked up the appropriation of $25,000 until the Navigation Company undertook in good faith to build lock and dam No. 7 and so satisfy the Secretary of War of their ability and purpose to do so. It did not give or pretend to give any power from the United States to the Navigation Company to build lock and dam No. 7, nor was the building of that lock and dam requested or approved by Congress, much less

did Congress by this agree that this lock and dam should forever be maintained under State control and for passing it tolls should be perpetually levied by a State corporation. Until it was built by the Navigation Company the money of the United States could not be expended.

Now it will not be overlooked that these moneys of the United States were to be expended on improving the Monongahela river in Pennsylvania, as well as Virginia, and in so far as they were to be expended in Pennsylvania, at or near Dunkards creek, they would relieve the Navigation Company of its duty under its charter to improve the navigation to the Virginia State line, *and*, besides, would open up new sources of trade which would increase its tolls. No wonder then that the Navigation Company, on April 6, 1881, passed resolutions of their *bona fide* intention to build lock and dam No. 7, but in these resolutions they added:

> "*In the manner and at the time required of them by the Acts of Assembly of the State of Pennsylvana.*"

The Navigation Company did not then pretend that in any way it had any Federal authority for its works or lock and dam No. 7, but it derived that solely from the State of Pennsylvania, and all it did after the Act of 1881 was passed, was to inform the Secretary of War it intended to obey the charter Pennsylvania gave to it. Thereby the Navigation Company did nothing but say it would do what it was legally bound to do under its Pennsylvania charter.

In what way this concluded the United States, or was the granting of power from the United States to the Navigation Company it is difficult to see.

It remains then as uncontrovertible that the Navigation Company had no other authority for the erection or maintenance

of lock and dam No. 7, than such as was given it by the State of Pennsylvania.

In the construction of Acts of Congress, under which a corporation claims privilege or rights as the Navigation Company pretends to in this case, to claim under the Act of Congress of 1881, the rule is well stated in the Bridge Co. vs. The United States, 105 *U. S.*, 482.

> "Nothing will be presumed to have been surrendered unless it was manifestly so intended—any doubt shall be resolved in favor of the government."

(II.) That the franchise of the Monongahela Navigation Company to collect tolls is one granted to it by the State of Pennsylvania only, and while, under the original Act of 1836, incorporating the company, the succession was perpetual, yet, by appropriate reservations, the State of Pennsylvania (*a*) reserved the right, at any time, to alter, amend or annul the charter in such manner, however, as no injustice shall be done to the corporators, and (*b*) reserved the right, at any time after twenty-five years from the completion of the improvement, to purchase the entire improvement and right of the Navigation Company by paying to the company the original cost of the improvement and expenses with eight (8) per cent. interest thereon, less the dividends declared by the Navigation Company.

The right of the Navigation Company, under the Pennsylvania statute, to take tolls for the use of its locks and dams is perpetual. In Section 2 of the Act of 1836, (page 30) it was provided that

> "the subscribers shall have perpetual succession, and all the privileges and franchises incident to a corporation," etc,, etc.

Section twenty (20) of the Act of 1836 (page 33) gives the right "to collect tolls" according to a rate established for the Schuylkill Navigation Company, and then follows a grading of the tolls according to the dividends they enable the company to pay.

Section five (5) of the Act of July 24, 1839, (page 39) enlarged the power of the company to take tolls and left it to the discretion of the company, provided the net dividends did not exceed twelve (12) per cent.,

> "Subject, however, to the control and regulation of the Legislature if at any time complaint should be made to the same."

Section three (3) of the Act of January 25th, 1854, confirmed this power to take tolls, subject, however, to the control of the legislature.

Section four (4) of the Act of May 20th, 1864, (page 58) gave a power to charge tolls for the use of chutes in the dams.

In an offer made on the trial in the court below the Navigation Company said that the company's actual dividends had been, for many years, twelve (12) per cent. per annum, and its capital stock originally fifty dollars ($50.00) per share, was selling in the market at one hundred dollars ($100.00) per share.

The right of the legislature of Pennsylvania to alter, amend or annul the charter of the Navigation Company is reserved in section twenty-one (21) of the Act of 1836, (page 37); section thirteen (13) of the Act of 1839, (page 40); section four (4) of the Act of March 21st, 1849, (page 53).

In addition as the Navigation Company accepted supplements to its charter, after the amendment of 1857 to the Constitution of Pennsylvania, it thereby subjected itself to that amendment, and this contained, on part of the State, the power to alter and revoke charters.

> Pennsylvania R. R. Co. vs. Duncan, 111 *Penna. St. Rpt.*, 353.

The State reserved the right to purchase the works at the end of twenty-five years, by section eighteen (18) of the Act of March 31st, 1836, (page 36), and upon such purchase being made the Act declared that

> "The privileges and corporate rights hereby granted will thereupon cease and determine, excepting so far as the same may be necessary in the settlement of the concerns of said company."

The terms were that the State should pay the original cost expended in the improvements and the subsequent expenses, together with six (6) per cent. interest thereon, deducting from the sum of principal and interest aforesaid, the dividends before declared by said company on the capital stock.

Section eight (8) of the Act of June 14, 1839, (page 39), changed the terms by saying that the Commonwealth shall pay the company such sums of money as, together with the next dividend, shall amount to the expense incurred in constructing said improvements, and keeping it in repair, with eight (8) per cent. per annum interest thereon.

(III). The Monongahela river rises in West Virginia, and flowing through Virginia into Pennsylvania unites at Pittsburgh with the Allegheny, forming the Ohio river. It was and is an important channel of inter-State commerce. Prior to the construction of the works of the Monongahela Navigation Company, the Monongahela was a navigable river and was used as such by the public.

These are facts asserted on the trial below by both sides. (See pages 19 and 21).

(IV.) The people of the United States granted to Congress the power to regulate commerce with foreign nations and among the States, and made the laws Congress would pass in execution of that power supreme.

Section one (1) of Article one (1) of the Federal Constitution reads thus:

> "All *legislative* powers herein granted shall be vested in the Congress of the United States which shall consist of a senate and house of representatives."

Section VIII of the same Article is:

I. "The Congress shall have power,

* * * * * *

4. "To regulate commerce with foreign nations and among the several States and with the Indian tribes."

* * * * * * *

19. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

This was a direct creation of Congress by

"We, the people of the United States,"

and also a direct grant to this Congress so created from the people of the United States of the power

"*To regulate commerce with foreign nations and among the several States.*"

In order to *regulate it*, to this Congress the people of the United States delegated the power.

"To make *all laws* which shall be necessary and proper for carrying into execution the foregoing powers."

It will be noticed:

(*a.*) That this delegation of power is from the people of the United States—not from any State or from the people of any State, but from the people of *the* United Sates. That is the people of the sovereign and independent power called the United States.

(*b.*) That this delegation of power by the people is to a Congress created by the people of the United States, the same independent sovereign power. The Congress was a body created by these people for the purpose of promoting certain

things which the people acting as a body were unable to do.

These considerations emphazises the fact that no State, government or State lines were considered. There was no other body to have control over Congress or concurrence in the powers granted. The Congress was not to regulate commerce in common with the States, but to Congress alone was given the sole and entire power to regulate commerce, and to make certain and definite the meaning of the people, as to the supremacy of the powers granted, they added by section 2 of Article VI:

> "This constitution and the laws of the United States, which shall be made in pursuance thereof, * * * * * *shall be the supreme law of the land;* and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

(c). When Congress, in pursuance of the power to regulate commerce passes a law it shall—so the people of the United States said—"*be the supreme law of the land.*"

And this

> "anything in the constitution or laws of any State to the contrary notwithstanding."

No matter what any or all of the States may have done—either by their organic law or legislative Acts—this law of Congress, when it is passed, becomes superior and supreme. This clause contemplates a possible conflict between the constitution, or the laws of the States, and those of Congress. In the conflict the people said the law of Congress must prevail.

(d). It was to Congress that the power to regulate commerce was delegated. Not to the executive or judicial department of the general government, but to the legislative department—the Congress made up of a House of Representatives and Senate.

(V.) The power to regulate commerce includes navigation, and includes all the streams of the United States on which inter-state or foreign commerce is carried on, and they become streams of the United States and under the control of Congress.

The time, mode and manner of control and regulation of these streams is discretionary with Congress, and while the State may, during the inaction of Congress, build over and in and control the streams within its border, yet such State regulations and control is subservient to and ends when Congress acts.

The power to regulate commerce is, as we have seen, vested in Congress exclusively, and in no other body or branch of the United States government.

It is the power "*to regulate.*"

All the power—not part of it or as to some of its parts—but all of it, in all its ramifications. Whatever is *a regulation* Congress under this delegation could enact. It has no limitations, except the other provisions of the federal constitution.

To regulate one must control, because there could be no absolute and complete regulation by one power if some other power might interfere.

The regulation, so broad and extensive, includes all the means appropriate to carry it out. Whatever tends to and forms a part of a system of regulation or control Congress has power to do. The degree in which the means so used will perfect or affect the regulation or control is immaterial. If it is a step, however short, it is as certainly within the Congressional power as if it were a step which entirely bridged the matter legislated about. And Congress is the sole judge of what is or is not an appropriate regulation. To that body alone the power was given in absolute, unmeasured terms, and it must always follow that such absolute grant of power includes and carries with it the selection of the means to carry it into effect. To no other body or power was granted a supervision of the exercise of the power. No other body could sit as judge to approve or condemn the means selected to carry out the power. The selection of these means was as absolutely given to Congress as the power itself. What the regulation should be—when it should be passed —when changed, and in what manner it should apply to commerce, are questions for Congress. When Congress provides a means the judiciary may not question it, provided it does not violate the federal constitution and is adapted to the end.

The selection of means, therefore, implies and includes the ultimate judgment as to the desirability of the selection, for if a government has the right to use, say, one hundred means to effect a regulation and it selects one, its judgment as to the desirability of the one selected must prevail. It may be that to others this would not seem desirable, but if it applies to the case, is really a step in the regulation of commerce, then

the desirability of the step is not an open question after Congress has passed on it. As Chief J. Marshall said in McCullough vs. Maryland,

> "Congress might employ those which, in its judgment, would most advantageously effect the object to be accomplished."

This commerce includes not only traffic, but all intercourse between the States and with foreign nations. It, therefore, also includes, as Judge Daniel expressed it in Veazie vs. Moore, "the means and vehicles by which it is prosecuted." It includes navigation, and by this all the streams on which intercourse between the States is carried on.

When the means selected for enforcing the power is under consideration the extent of the power and the fact that it includes all intercourse, not alone traffic in goods and merchandise, should be remembered.

So far as the means of carrying on inter-state commerce by the rivers is concerned, the State, in the absence of the exercise of the power by Congress, may itself legislate and control, but this is and can only be during the non-intervention by Congress. When Congress once intervenes—once shows by an affirmative act its purpose to take upon itself the control of these rivers—then from that date on the State's power ceases. The supreme power must prevail; and when once exercised is exclusive of the State. This is especially so when the nature of the means used by Congress shows its intent to take exclusive control and management.

The following extracts from cases, and the cases themselves, it is believed to the fullest extent sustain the point and the reasons urged in supporting it:

In Gibbons vs. Ogden, 9 *Wheaton*, 197, this court said, speaking of the power to regulate commerce.

> "It is the power to regulate; that is, to perscribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. * * * * * * * The power of Congress then comprehends navigation within the limits of every State in the Union so far as that navigation may be in any manner connected with 'commerce and foreign nations or among the several States, or with the Indian tribes.'"

The court in that case held that a law of New York giving the exclusive power to Livingston and Fulton to navigate by steam the waters of New York, was void.

In Wilson vs. Blackbird Creek Marsh Co., 2 *Peters*, 252, the State of Delaware authorized the erection of a dam across the Blackbird Creek Marsh, which one engaged in navigation tore down, on the ground that the creek was navigable, and the dam interfered with navigation. The court said:

> "If Congress had passed any Act which bore upon the case; any Act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows and which abound throughout the lower country of the middle and southern States we should feel not much difficulty in saying that a State law coming in conflict with such Act would be void. But Congress has passed no such Act."

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In Gilman vs. Philadelphia, 3 Wallace, 725, a bridge had been erected under the authority of the State of Pennsylvania over the Schuylkill river which interfered with navigation. This court said:

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose and to the extent necessary of all the navigable waters of the United States, which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation interposed by the State or otherwise; to remove such obstructions when they exist, and to provide by such sanctions as they may deem proper against the occurrence of the evil, and for the punishment of offenders. For these purposes congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England. *It is for Congress to determine when its full power shall be brought into activity and as to the regulations and sanctions which shall be provided.*"

In the Bridge Company vs. United States, 105 U. S., 482, in the broadest manner the power of Congress was upheld. We cite from it:

> "But the power of Congress in respect to legislation for the preservation of inter-state commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of congress is supreme and overrides all that States may do. When, therefore, congress, in a

proper way, declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. *Those who act on State authority alone necessarily assume all the risks of legitimate congressional interference.* * * * Congress, which alone exercises the legislative power of this government, is the constitutional protector of foreign and and inter-state commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges which affects so important a branch of governmental power ought certainly to be strictly construed. *Nothing will be presumed to have been surrendered, unless it was manifestly so intended. Every doubt shall be resolved in favor of the government.*"

In Miller vs. Mayor of New York, 109 *U. S.*, 392, the language is this:

"Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, *it has the control of all* navigable waters between the States, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction is necessarily paramount and conclusive. It may, in direct terms, declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction."

In county of Mobile vs. Kimball, 102 *U. S.*, 696, it is said of the power of Congress to regulate commerce:

"That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens * * * * and to adopt

> measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within this power. The subject, indeed, upon which Congress can act under this power are of infinite variety requiring for their successful management different plans or modes of treatment. * * * * * * State action upon such subjects can constitute no interference with the commercial power of Congress, *for when that acts the State authority is superseded.*"

Continuing the court say the removal of obstructions to navigation does not interfere with the power of Congress to regulate commerce, and the States may make improvements by deepening rivers, etc.,

> "If they do not impair their free navigation, as permitted under the laws of the United States, *or defeat any system for the improvement of their navigation provided by the general government.*"

In South Carolina vs. Georgia, 93 *U. S.*, the questions are elaborately considered:

> "Prior to the adoption of the Federal Constitution, the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah river. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another, where there were two. They had plenary authority

to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will. This will not be denied; but the power to "regulate commerce," conferred by the Constitution upon Congress, is that which previously existed in the States."

* * * * * *

"But it is insisted on behalf of the complainant that, though Congress may have the power to remove the obstructions in the navigatble waters of the United States, it has no right to authorize placing obstructions therein; that while it may improve navigation, it may not impede or destroy it."

* * * * * *

"*It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States*, either to assist navigation or to change its direction by forcing it into channels of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigation to pass along a prescribed channel, and may close any other channel to their passage. If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over inter-state and foreign commerce is concerned, this is not to be doubted. Might not the States of South Carolina and Georgia, by mutual agreement, have constructed a dam across the cross-tides between Hutchinson and Argyle island, and thus have confined the navigation of the Savannah river to the southern channel? Might they not have done this before they surrendered to the federal government a portion of their sovereignty? Might they not have constructed jetties, or manipulated the river, so that commerce could have been carried on exclusively through the southern channel, on the south side of Hutchinson's island? It is not thought that these questions can be answered in the

negative. Then why may not Congress, succeeding, as it has done, to the authority of the States, do the same thing? *Why may it not confine the navigation of the river to the channel south of Hutchinson's island; and why is this not a regulation of commerce, if commerce includes navigation? We think it is such a regulation.*"

In the Passaic bridge case, 3 *Wallace*, 790, Mr. Justice Grier, speaking of the methods of regulation, said:

"It is plain that these are subjects of legislation not judicial discretion."

In Wisconsin vs. Duluth, 96 *U. S.*, 383, this court said:

"It is to be observed, as preliminary to an examination of the Acts of the general government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the sea-coast or on the lakes or great navigable rivers of the interior, has for years been mainly under the control of that government, *and that, whenever it has taken charge of the matter, its right to an exclusive control has not been denied.* * * * * It cannot be necessary to say that when a public work of this character has been inaugurated or adopted by Congress, and its management placed under the control of its officers, there exists no right in any other branch of the government to forbid the work, or to prescribe the manner in which it shall be conducted."

* * * * * *

"We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these Acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improve-

ment started by the city of Duluth, and a taking exclusive charge and control of it. That they amount to the declaration of the Federal government, that we here interpose and assert our power. We take upon ourselves the burden of this improvement, which properly belong to us, and that hereafter this work for the public good is in our hands and subject to our control."

* * * * * *

"Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the government was organized under the constitution. The only question ever raised has been how far and under what circumstances the exercise of the power is exclusive of its exercise by the States. And while this court has maintained in many cases the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, *the doctrine has been laid down with unvarying uniformity that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority.* The adjudged cases in this court on this point are numerous.

"This subject was recently very fully considered in South Carolina vs. Georgia *et al.*, 93 *U. S.*, 4, and at this term in Pound vs. Turk, 95 *id.*, 459. The doctrine was settled, however, long before this. The following cases are fully in point: Gibbons vs. Ogden, 9 *Wheat.*, 1; Wilson *et al.* vs The Blackbird Creek Marsh Co., 2 *Pet.*, 245; The Wheeling Bridge Case, 18 *How.*, 421; Gilman vs. Philadelphia, 3 *Wall.*, 713."

"If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system

of harbor improvements at Duluth, this court can have no lawful authority to forbid the work."

In Williamette Iron Bridge Co. vs. Hatch, 125 *U. S.*, 8, the doctrine is thus stated:

> "The clause in question (Act of 1859) cannot be regarded as establishing the police power of the United States over the rivers of Oregon, or as giving to the Federal courts the right to hear and determine, according to Federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of those rivers. We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and inter-state commerce; we only say that, in our opinion, it has not done so by the clause in question. And, although, until Congress acts, the States have the plenary power supposed, yet, *when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from* being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams."

In Stockton vs. Baltimore & N. Y. R. R. Co., 32 *Fed. Rep.*, 16, Mr. Justice Bradley said:

> "So that we are brought back to the question of of the power of Congress to build the bridge, and whether that power is independent of the consent and concurrence of the State government. And, in our judgment, this question must be answered in the affirmative."
>
> "The power to regulate commerce among the several States is given by the constitution in the most general and absolute terms. The '*power to regulate,' as applied to a government, has a most extensive application.* With regard to commerce, it has been expressly held that it is not confined to commercial transactions, but extends to seamen, ships, navigation, and the appliances and facilities of commerce. And it must extend to these, or it cannot embrace the whole subject. Under this power, the navigation of rivers and harbors has been opened and improved, and we have no doubt that canals and water-ways may be opened to connect navigable bays, harbors and rivers with each other, or with the interior of the country. Nor have we any doubt that, under the same power, the means of commercial communication by land as well as by water may be opened up by Congress between different States, whenever it shall see fit to do so, either on failure of the States to provide such communication, or whenever, in the opinion of Congress, increased facilities of communication ought to exist."
>
> * * * * * *
>
> "Still, it is contended that, although Congress may have power to construct roads and other means of communication between the States, yet this can

only be done with the concurrence and consent of the states in which the structures are made. If this is so, then the power of regulation in Congress is not supreme; it depends on the will of the States. We do not concur in this view. *We think that the power of Congress is supreme over the whole subject, unimpeded and unembarrassed by State lines or State laws; that, in this matter, the country is one, and the work to be accomplished is national; and that State interests, State jealousies, and State prejudices do not require to be consulted. In matters of foreign and inter-state commerce there are no States.*

* * * * * * *

"The most strenuous objection, however, to the exercise of the power in this case, and in the manner proposed, is based on the fact that the piers of the bridge are to rest, and the bridge is to stand, on land which belongs to the State, and that no compensation is proposed to be made for the taking thereof. It is contended that, if the land of the State can be taken at all, (which is denied,) it can, at most, only be taken, like other private property, after just compensation has been made."

"*First.* It is denied that the land of the State can be taken at all without voluntary cession, or consent of the State legislature. If this is so, we are brought back to the dilemma of requiring the consent of the State in almost every case of an inter-state line of communication by railroad, for hardly a case can arise in which some property belonging to a State will not be crossed. It will always be so at the passage of a navigable stream. This shows that the position cannot be sound, for it brings us to a *reductio ad absurdum.* It interposes an effectual barrier to the execution of a constitutional power vested in Congress. It overlooks the fundamental principle that the constitution, and all laws made in pursuance thereof, are the supreme law of the land; for, if the consent of a State is necessary, such State may al-

ways, in pursuit of its own interests, refuse its consent, and thus thwart the plain objects and purposes of the constitution."

* * * * * *

"Thus it was decided by the Supreme Court in the case of Kohl vs. U. S., 91 *U. S.* 367, that the government of the United States may exercise the right of eminent domain within a State, for the purpose of condemning land for the use of post office building, and may, for this purpose, resort to its own courts. In such a case there cannot be a doubt that the post office building could be erected and used by the government without asking the consent of the State legislature. Such consent would, indeed, be necessary to vest in the United States exclusive jurisdiction over the post office building and grounds; but it would not be necessary to enable the government to use the property for the purpose for which it was acquired. And so of any other property wanted for a public purpose; the consent of the legislature is not necessary to its acquisition, or to its use; but only to the exclusion of State jurisdiction over the place."

* * * * * *

"The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain, or anything else, it must be received as a postulate

of the Constitution that the government of the United State is invested with full and complete power to execute and carry out its purposes. And as one of these purposes is the regulation of commerce among the several States, and as that involves the needs and ways of inter-communication, it follows that Congress may provide for these necessities whether the States co-operate and concur therein or not.

"But, *secondly*, it is contended that if the United States can constitutionally take the land of the State, as well as that of the citizen, for public purposes, without consent, it can only do so in the same manner, and subject to the same conditions, namely, that of making just compensation. It is urged that the language of the fifth amendment of the Constitution is applicable to the case, and is imperative. This language is, 'nor shall private property be taken for public use without just compensation.' It is insisted that the property of the State in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked, can the United States take the state-house at Trenton, and the surrounding grounds belonging to the State, and appropriate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the State-house is quite different from that by which it holds the land under the navigable waters in and around its territory."

* * * * * *

"*The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to*

commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had, or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. *So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable water against the will of Congress, and Congress may summarily remove such obstruction at its pleasure. And all this power is derived from the power 'to regulate commerce.'*"

In McCullough vs. Maryland, 4 *Wheaton*, 409, C. J. Marshall laid down the rule ever since followed for the determination of the choice of means by the United States government under the Federal constitution:

> "The government which has a right to do an act and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means." * * * *
>
> "Let the end be legitimate, let it be within the scope of the constitution, and *all* means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

See, also, Huse vs. Glover, 119 *U. S.*, 544.
Packet Co. vs. Keokuk, 95 *U. S.*, 85.
Rundle vs. Delaware & Rariton Canal Co., 14 *Howard*, 92.
Sands vs. Manistee River Co., 123 *U. S.*, 292.
Veazie vs. Young, 14 *Howard*, 571.

Hamilton vs. Vicksburg R. R. Co., 119 *U. S.*, 281.

Williamette Iron Bridge Co. vs. Hatch, 125 *U. S.*, 10.

(VI). The legislation of Congress providing for the purchase or, on inability to purchase, the condemnation of lock and dam No. 7, of the Monongahela Navigation Company in the Monongahela river was a lawful exercise of its power to regulate commerce, and the law thus passed became the supreme law of the land, and the rights of the Navigation Company and the State of Pennsylvania in the Monongahela river were both subservient to and governed by it.

That the United States, as a sovereign power, has the right of eminent domain, and may, in the execution of its powers of government, exercise it to take and condemn such property as it needs for governmental purposes, is conceded in this case. If it had not been, it is affirmatively and definitely settled in Kohl vs. United States, 92 *U. S.*, 367, and Pollards, Lessee vs. Hagan, 3 *Howard;* see, also, opinion of Mr. Justice Bradley in Stockton vs. Baltimore & New York R. R. Co., 32 *Fed. Reptr.*, 16.

The Monongahela Navigation Company, under the legislation of the State of Pennsylvania, in evidence and hereinbefore referred to, took and has actual bodily and exclusive possession of the Monongahela river from Pittsburgh to the

Virginia State line. Across the river, at seven places, it has erected dams and locks, and still maintains them. It established a rate of tolls discretionary with itself, except that its dividents shall not exceed twelve per cent. per annum, but this is over and above all expenses for re-construction and repairs. The State of Pennsylvania may, twenty-five years after they are finished, purchase these improvements at cost and interest, less dividends.

This right of the navigation company in this river and to these dams and tolls is, under the Pennsylvania legislation, perpetual and also exclusive. The State and corporation have a system of improvement, giving them the exclusive control of the river.

But this river is one of the channels of inter-state commerce, and, therefore, one of the streams of the United States, subject to the exclusive control of Congress, and Congress has, in the plainest way, declared its purpose to take charge and control of it.

It would seem to be the clearest kind of conclusion, under the authorities hereinbefore cited, that the Act of Congress was supreme and must govern—for otherwise the State of Pennsylvania, and its corporation, the Monongahela Navigation Company, may exclude Congress from the exercise of a plainly granted power over the Monongahela river.

What reason does the Navigation Company give for insisting that Congress may not take the locks and dams by it erected in this river?

It avers that these locks and dams are not an obstruction to, but an improvement of navigation on the Monongahela river, and that while Congress might take them, if they were an obstruction, it is powerless to take them if they are not an obstruction, but an improvement.

A little examination will show that this is in conflict with that provision of the Federal Constitution, which grants the power to Congress to regulate commerce, because

(*a*) *It would lead to State control of the channels of inter-state commerce.*

As construed by this court that power is vested exclusively in Congress, and is entire, unimpeded and unembarrassed by State lines. The streams forming the channels of inter-state commerce are streams of the United States. When Congress declares its purpose to regulate and control these streams the power of the States is ended. Indeed, as Judge Bradley said as to inter-state commerce "there are no States," (32 *Fed. Rept.*, 17.)

Now, if the plaintiff's contention is true, that where the State improves one of these streams Congress has no power over it, *because* its power is only to improve or remove obstructions—then the power of Congress is always dependent upon State action, and all any State need do to oust that control of Congress is to improve the streams within its borders. If they will do so, then Congress is powerless to act.

Such a conclusion shows the fallacy of the position, for this court, in the cases cited, has steadily adhered to and enforced the supremacy of Congress and limited the power of the States as to local improvements merely during the inaction of Congress.

(*b*) *It considers only a portion of the power given to Congress to regulate inter-state commerce.*

The position of the Navigation Company is that on the rivers this power to *regulate* is restricted to the power to *improve.*

But this takes from Congress most of the power the Federal constitution gave it. That power was to "*regulate.*" To *improve* the navigation is only one part of "regulation." This power "to regulate" includes, it is true, the power "to improve," but it includes much more. It includes the establishment of all rules governing the navigation. The number and variety of such rules it would be difficult to enumerate. See Mr. Justice Bradley in Stockton vs. R. R. Co., *supra.*

The *improvement* of the river on which the vessels go that carry the articles of traffic is but a part of the power. Commerce includes all intercourse between the States, and the regulation of such intercourse might require many rules, and, in this case, in the judgment of Congress, required it to take actual possession of the river and any improvements therein.

(*c.*) It overlooks the fact that to thoroughly control the navigation Congress might think fit to take actual possession, and this for no other reason than (*a*) to take it out of State control; (*b*) or because it desired to make the navigation free for which the State corporation charged tolls, or (*c*) because it desired to prevent any further State improvement. And how these results may best be obtained is a legislative, not a judicial, question.

That Congress may take possession and improve the river even the Navigation Company admits, and that Congress might, by an Act, declare the entire navigation improvement of the river a hindrance and institute a new system of improvements, seems to be well settled.

Wisconsin vs. Duluth, 96 *U. S.*, 383.
South Carolina vs. Georgia, 93 *U. S.*, 9.
State of Pennsylvania vs. Wheeling Bridge, 13 *Howard*, 557.
Same vs. Same, 18 *Howard*, 430.

It is nowhere more plainly stated than by this court in the Bridge Company vs. United States, 125 *U. S.*, 479, where these words were used:

> "But the power of Congress in respect to legislation for the preservation of inter-state commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme and overrides all that the State may do. When, therefore, Congress, in a proper way, declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. *Those who act on State authority alone necessarily assume all the risks of legitimate congressional interference.*"

In that case the Bridge Company was put to large expense to change the bridge to suit Congress, and this court held it was properly paid for by the Bridge Company.

Again, in Williamette Bridge Company vs. Hatch, 125 *U. S.*, 12, in the opinion delivered by Mr. Justice Bradley, he stated, in the strongest manner, the power of Congress to abate any erection by the States in State streams.

Congress may then lawfully take possession of and improve a stream, and this whether the State has or has not begun such improvements, provided it first condemns and displaces the State work.

But if this be so, why may not Congress take such State erections as it finds in the river, utilize them so far as it sees fit, and thereafter change or abolish them as, in its discretion, is wise. What reason is there in the position that while Congress may condemn and remove a structure in the river, it cannot take it, and under new regulations make it, under direct Congressional control, a direct means of intercourse between the States. Especially why would such a doctrine be held, if, as in this case, the State improvements fill the river, and Congress cannot get its own—*i. e.*, the river—unless it takes or condemns the improvements.

It would be a very dangerous doctrine for the owners of State improvements in rivers to hold that Congress may not take and recompense those making such improvements, but it may declare such improvements a hindrance to navigation, and, therefore, a nuisance, and then abate them without compensation. The tendency of such a rule would probably be to the detriment and injury of those owning such improveprovements, and not to their benefit.

If Congress may declare any erection an interference with navigation and abate it without compensation to its owner, then it depends wholly on the discretion of Congress whether it will or will not compensate those who under State authority erect so-called inprovements. If so, the sum in any case to be paid is discretionary with Congress.

If it be said this is a dangerous power, the answer is all power is dangerous. As the Federal constitution clearly gave it to Congress, the danger of the power is not a proof it does not exist. It was to prevent State control of the streams of commerce that the people gave the power to Congress. Congress may in pursuance of such power, and for no other reason

than the State is controlling it, take any stream of commerce, and if such stream is filled with State improvements it may certainly abate them and, as it seems to us, as certainly take them. To hold it could not take such State improvements would exclude Congress from the State river so improved, and thus give such river to the State.

Is not the taking a means to a legitimate end (control) and thus discretionary with Congress.

Legal Tender Cases, 12 *Wallace*, 532.

The Act of Congress for the condemnation of lock and dam No. 7 provided that when the United States acquires the lock and dam it should thereafter be subject to section 4 of the Act of July 5th, 1884, which provides that no tolls or operating expenses of any kind shall be charged for any vessel passing through the lock and dam, and that the same should be maintained out of the treasury of the United States.

This shows dissatisfaction by Congress with the policy of the State of Pennsylvania in charging tolls for the use of the improvements in the Monongahela river, and its intention to make such navigation absolutely free.

Is not this clearly a regulation of navigation, and hence of commerce, and if so, is not the advisability of it a congressional and not a judicial question?

This intent of Congress to make free the navigation of this river is further shown by the River and Harbor bill of September 19th, 1890, where a similar provision is made as to

lock and dam No. 6. This, Congress is also to acquire, and when acquired it is to be made free for all navigators.

Is not this right of Congress, *solely for the purpose* of making the navigation absolutely free, to take possession of these improvements in the Monongahela river fully supported by Gibbons vs. Ogden, 9 *Wheaton*, 197. In that case New York granted to Livingston and Fulton the exclusive navigation of all State waters with boats propelled by steam. This court held that this Act was void, because it interfered with an Act of Congress which gave to a coasting vessel the right to navigate these waters. There was no physical obstruction of any of the New York streams, but because the Act of New York put the exclusive use of the streams in the hands of State agents it was void as against a vessel claiming the right under Congress to navigate.

In the case at bar the State of Pennsylvania puts the Monongahela river between Pittsburgh and Virginia in the hands of a State corporation, and gave to that corporation the perpetual and exclusive power to maintain dams and collect tolls. The character of the dams, the amount of tolls, were decided not by Congress but by the State. To compel all navigators to pay tolls for the use of the river is a regulation, if it is not an obstruction to navigation.

> "To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted."
> Henderson vs. Mayor of New York, 92 *U. S.*, 270.

Why may not Congress pass a law, the effect of which is to make the navigation of these waters free, just as they made free the waters of New York?

The power of Congress to prohibit the collection of tolls over the streams of the United States seems to be fully recognized by this court.

In Caldwell vs. Bridge Company, 113 *U. S.*, 210, the Act of Congress admitting California into the Union declared that

> "All the navigable waters within the said State shall be common highways, and forever free as well to the inhabitants of said State as the citizens of the United States without any tax, impost or duty therefor."

This court said the meaning of this Act was, (page 212;)

> * * * * * "To insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable rivers by private parties to the exclusion of the public *and the exaction of any toll for their navigation.*"

The same principle was approved in Escanaba Company vs. Chicago, 107 *U. S.*, 689, and Hamilton vs. Vicksburg R. R. Co., 119 *U. S.*, 284, and the power of Congress to make such provision was not doubted.

From 1836 down the State of Pennsylvania legislated as to the control of the Monongahela river. Repeated Acts were passed. The height of dams and width of locks regulated and the amount of tolls supervised.

Now, as this stream was a stream of the United States, on which interstate commerce could be and was carried on, it was within the control of Congress, and so soon as Congress desired to take actual control and prevent further State action, it was within its power to do so, and discretionary how

it would do so. To take actual possession and legislate about it itself was one mode, and, as Congress has selected it, it is not subject to judicial control, except to see that it does not violate any of the provisions of the Federal constitution. It is not pretended that it does violate any other Federal provision (except as to taking private property, which we consider further on), and, therefore, is a constitutional exercise of power.

It should not be overlooked that:

(1.) The choice of means by which Congress carries out its regulations of commerce is always discretionary with Congress, and is never a subject of judicial control—except where it infringes other provisions of the Federal constitution. If the means be adapted to reach the end sought and be not prohibited—they are lawful. Whether it is a wise and judicious or injudicious Act is not for the courts.

Gibbons vs. Ogden, 9 *Wheaton*, 197.

(2.) The absolute, exclusive and supreme control of all the streams which are means of inter-state commerce is given to Congress, and no matter what any State may do, it never can in any degree lessen the power. At such time as Congress sees fit it may intervene, and when once it does so its act is supreme and exclusive of all State interference.

As this court, in Wisconsin vs. Duluth, 96 *U. S.*, 383, said whenever Congress:

"Takes charge of the matter its right to an exclusive control has not been denied."

That the interference by Congress amounts to:

"* * * the declaration of the Federal government that we have interfered and assert our power. We take upon ourselves the burden of this improvement, which properly belongs to us, and that *hereafter this work for the public good is in our hands and subject to our control.*"

(3.) What is and what is not an improvement of navigation so far as inter-state commerce is concerned is a congressional and not a judicial question, and whether a certain set of locks and dams do or do not constitute an improvement or an interference with navigation, can only be determined by Congress.

Yet the whole argument of plaintiff in opposition to the power of Congress to take lock and dam No. 7, is, that the court below found that the system of slackwater navigation from Pittsburgh to the Virginia line, aided and did not obstruct the navigation of the river.

Yet, in truth, this finding was futile, because the question pressed was not one of which the courts had jurisdiction, but one which belonged solely to Congress. To oust the jurisdiction of Congress where it had affirmatively acted as to the river by finding that the very thing Congress proposed to take was an improvement of the river by the State, and this Congress could not take unless it declared it an obstruction to or interference with navigation, is to hold that Congress, which is the ultimate power to pass upon the question, had in effect omitted its duty and delegated it to the courts.

This would be mere assumption. Even if there was a necessity for Congress, before it took or removed from the river lock and dam No. 7, to declare it under State control to be

an interference with navigation, then the act of Congress alone in directing its acquisition by the United States would in effect be such a declaration and would be so considered. If the power which took, had also the power to declare the thing to be an obstruction, and such a declaration was a condition precedent to the taking—would not the declaration that Congress would take, in effect, be a declaration that as it stood, under State control, the thing to be taken was an obstruction?

(VII.) The franchise of the Monongahela Navigation Company to take tolls is derived only from the State of Pennsylvania, and these tolls are collected for the use of State improvements. In the condemnation of the locks and dams the United States need not pay for the franchise to take tolls because,

(*a.*) It does not *take* this franchise.

(*b.*) The right to collect tolls being a State grant was determined when the United States Government took control of the river.

Congress provided, as to lock and dam No. 7, that if the Secretary of War was unable to purchase the same he should proceed to condemn, using a State statute for the purpose, and added:

"That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated."

The thing which the government is to take is lock and dām No. 7, and its appurtenances.

It is certain that this franchise to take tolls is not *taken* by the United States.

It is a franchise creating a charge in effect for the navigation of one of the streams of the United States on which inter-state commerce is carried on, and the particular thing for which these tolls are charged is the use of lock and dam No. 7.

But the maintenance of lock and dam No. 7 is only, as we have seen, during the pleasure of Congress—and when Congress evidences its pleasure that under the State authority this lock and dam should no longer be upon the Monongahela river that ends the days of its life. It was a limitation at the time of its birth, and though its rapid growth and increase in wealth may have induced the Navigation Company to forget this law of its environment, yet such law remains and will be enforced by the courts.

What was there for Congress to pay for as to this franchise?

Not the future right to take tolls, because there was no future right. That right ended with the action of Congress.

But it is perfectly plain that if the Navigation Company had no future right to take tolls on lock and dam No. 7, its franchise to take tolls could in no measure affect the value of the sum to be paid for lock and dam No. 7, and therefore the exclusion from consideration of such future right in the determination of the value of lock and dam No. 7 did not injure in any way the Navigation Company.

In the exercise of its governmental powers the United States makes compensation only for the property it *takes*, not for that it consequentially injures:

Smith vs. Corporation of Washington, 20 *Howard*, 135.

Transportation Co. vs. Chicago, 99 *U. S.*, 640.

Now, the government does not take the franchise of the Navigation Company to collect tolls.

This franchise from the State the Navigation Company still possesses, though its use as to lock and dam No. 7 is determined.

What it takes is the lock and dam and its appurtenances, and for *all* the rights of the Navigation Company in and to this property the court below awarded a sum of which no complaint is made.

The complaint is that the value of lock and dam No. 7 should have been fixed by the tolls, which, during its future existence it would probably realize to its owner, the Navigation Company, but, of course, no such mode of valuation could be used unless the right to the future maintenance of its dam was established as against the party taking. In this case, as we have seen, there was no such future right, and, therefore, such a mode of valuation would have been and was impossible.

It would have been to give to the Navigation Company money for a thing it did not own, and to put a fictitious value on the lock and dam taken. The Navigation Company wants not only to be made whole, but to be paid an enormous sum for the right of prospective collection of tolls.

Suppose that Pennsylvania had not created the Navigation Company, or, having created it, with its powers, that com-

pany had not erected any locks and dams in the river, and when Congress proposed to take possession of the river, the State or the Navigation Company had demanded before the Federal power could do so, to be paid the value of the franchise, to take tolls.

Would any one doubt that such a demand was unlawful and never could be enforced? From whom did Pennsylvania get the right to grant franchises to perpetually take tolls on one of the streams of the United States, and to use this as a mode of preventing congressional interference? Well, if the question so plainly put gives such a plain answer in what manner is any material change made in it by the erection of the locks and dams.

Does the erection of the locks and dams give the Navigation Company any right to demand from the Federal government payment for its franchise to take tolls which without such erections it was not entitled to? How could the erection of the locks and dams give any franchise of any kind?

If then in the condemnation of this lock and dam Congress would not be liable for the franchise to collect tolls, and such franchise could not be used to show the value of the property taken, it certainly was not illegal for Congress in the Act for the condemnation of the locks and dams to say it did not take and would not pay for such franchise.

The fact that trade and intercourse was carried on through this improvement between points in the State of Pennsylvania could not influence the question of the value of the

lock and dam. The lock and dam itself and the improvement of the Navigation Company covered and included the entire river from Pittsburgh to the Virginia State line, and Congress could take them because they were on a stream of the United States the control of which was granted to Congress.

When the Navigation Company erected the lock and dam it knew, as we have seen, that it could maintain it only during the pleasure of Congress, and when the end came it was the natural expiration of its life.

It is the right of Congress to move or take the lock and dam which determines the question.

If it has that right it is by virtue of the power it had before, and when this lock and dam were erected, no matter for what purpose the dam was used, the interference of Congress in the execution of the pre-existing and superior right determined it. To hold otherwise would be to exalt the State over the United States in regulating commerce.

The fact that a lock and dam, the life of which it might at any time determine could be or was used for State traffic, could not clog or prevent the exercise of congressional power. As they were on a stream of the United States they could be taken by Congress. Because, if not taken, they could be used by a State corporation for State traffic, and hence tolls could be taken, certainly would not be a legitimate mode of proving actual value because such use of the river to collect tolls for State traffic cannot be separate and apart from a use which also controls inter-state traffic. To take tolls for State traffic the lock and dam must be maintained; but, as we have seen, they are a control of navigation or regulation of inter-state commerce and can exist only during the pleasure of Congress.

(VIII.) As the Monongahela river is not wholly within the State of Pennsylvania, that State had no power to grant the franchise it did to the Monongahela Navigation Co.

This brief has so far proceeded upon the assumption that the State had the power to authorize the Navigation Company to enter and construct its works upon this river. It is a grave question, however, whether the State of Pennsylvania ever had any authority over the Monongahela river, which is not a river wholly within its boundaries, but is an inter-state highway partly in West Virginia and flowing into the Ohio, another inter-state highway. It is believed that all the cases holding that the State had the right, prior to action by the United States Government, to exercise acts of authority over navigable waters, are cases where the water in question was wholly within the State. This question is referred to and discussed in *Hare's American Constitutional Law*, volume 1, pages 497-500, and is referred to in the opinions of the court in the case of the Williamette Bridge Co. vs. Hatch, 125 *U. S.*, 1, and in the Passaic Bridge Cases, 3 *Wall*, 792.

C. NEWELL,
KNOX & REED,
D. T. WATSON,
Attorneys.

RECORD, CASE No. 14,589.

OCT 24 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 1122.

The Monongahela Navigation Company, Appellant and Plaintiff in Error.

vs.

THE UNITED STATES.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF

ON BEHALF OF APPELLANT.

WAYNE MacVEAGH,
THOMAS D. CARNAHAN,
JOHNS McCLEAVE,
Attorneys for Navigation Company.

BYERS, DONEY & CO., PRINTERS, PITTSBURGH.

IN THE

Supreme Court of the United States.

MONONGAHELA NAVIGATION COMPANY, Appellant,

vs.

UNITED STATES.

No. 1122 OCTOBER TERM, 1891.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT.

At the trial of this cause in the Court below, there was no argument of the questions arising upon the record. The Court decided the questions raised by the requests for holdings without argument. In the preparation of the original brief, therefore, we did not have the advantage of the Appellee's views. Since then we have received, however, a copy of a brief on behalf of the United States, prepared by the Attorneys of the Pittsburgh Coal Exchange, and also the Argument of the Attorney General. As to some of the arguments set forth, we wish to add a word to our brief heretofore filed.

We consider it settled law that the action of the State of Pennsylvania, authorizing the improvement, in the absence of any Act of Congress, was perfectly lawful. The United States is the only power that can, under any circumstances, make it unlawful. If

Congress has antecedently consented to the Act of the State, or subsequently approved the Act of the State, such Act then becomes lawful even as against the United States. What Congress could antendently authorize, of course, it could subsequently approve.

What we now contend is, that the Act of Congress, accepting and adopting for and on behalf of the United States, and for its use, the Act done by the State, is approval by the only power having a right to disapprove of the State Act, and is such approval in the most emphatic and conclusive manner in which approval could be manifested. So approving, Congress can not at the same time, and in approving, by adopting the Act for and on behalf of the United States, reject or ignore the conditions under which the State Act has been performed, or the means by which the State has secured its performance; for this would be to divide that which in its essential nature is indivisible, to accept for the United States its benefits and reject its burdens. True, Congress may approve the State Act, the work done by the Act of the State, because it wills to abolish the future continuance of the conditions under which it was done. But by accepting, they approve its doing, and the terms by which it was done. If adopting the State Act, on behalf of the United States, is approval, the State Act, *the whole of it*, on such adoption, is approved. The future continuance of the conditions, upon which the Act has been performed, *being destroyed only by such adoption*, which is approval, such destruction must be by the exercise of the right of eminent domain, conditioned upon making compensation.

Taking the lock and dam expressly for the use of the United States is an acceptance and approval of that done by the State; declaring, that in estimating its value, its earning power, under the conditions of its erection, shall not be considered, is a rejection of the very terms, the only terms by which the State has secured the doing of the work; is a clear attempt to escape paying its value at the time of taking, and to only pay its worth, as an unproductive lock and dam, *after* the taking is complete—after the tolls have ceased by the taking. The work of the State is accepted, and therefore, approved; but the terms of its accomplishment

are rejected. But the Act of the State was and is an entirety, not severable into fragments or parts. The acceptance and approval of the thing done is an approval of the State's Act in all its parts—its benefits and its burdens.

It is argued on behalf of the Appellee:

> "What is there for Congress to pay for as to this franchise? Not the future right to take tolls, because there was no future right. That ended by the action of Congress. But it is perfectly plain that if the Navigation Company had no future right to take tolls on Lock and Dam No. 7, its franchise to take tolls could in no measure affect the value of the sum to be paid for Lock and Dam No. 7, and, therefore, the exclusion from consideration of such future right in the determination of the value of Lock and Dam No. 7, did not injure in any way the Navigation Company."

The statement that the right to take tolls in the future has ended with the action of Congress, is a mistaken assumption. The right to take toll did not end with the action of Congress, has not yet ended, and will not end until after the taking is completed by the payment of the price. It then ends only because the United States comes into possession of the physical property in which the right is exercised, and the further exercise of the right is thereby suspended. ***In no other way has the United States intervened to destroy the right, except by the appropriation of the structure in which the right is exercised, by the adoption and acceptance for its own use, of the work which the State of Pennsylvania procured us to do.*** In this way, and in this way only, is the collection of tolls prevented. By the adoption and acceptance of the work done as its own, and as if done for it, the United States concedes its liability to pay. In estimating the amount therefore, to be paid, why must not the right to take toll *in future*, which would exist except for the appropriation and adoption of the property for and on behalf of the United States,—destroyed only by such adoption and acceptance,—be considered? Is not the loss of the right, in this manner, a direct and immediate injury flowing from the Act of taking, and the adoption of the work for

for the use of the country? Is it not a bald attempt to approve what the State has secured to be done by accepting and adopting it *as a thing done for the United States*, and in the very Act of such acceptance, rejecting, in the computation of the sum to be paid, the conditions by which the thing done has been secured.

True, the United States does not take the privilege of the Navigation Company to charge toll, but by the taking of the physical structure in which the privilege is exercised, the further exercise of the privilege is suspended. The question is, therefore, not what is to be paid for the abstract privilege, which is not taken, but what is to be paid for the structure taken. And, how is the value of the structure to be estimated, except by considering the purpose of its erection, and its capacity to earn a reward to the company erecting it? It is not a valuation of the franchise of the company, *but a consideration of the earning power of the physical structure* under the privilege to take tolls for its use, the further exercise of which privilege is suspended by the appropriation, *and only by the appropriation.*

Confessedly there are many difficulties, of which this particular case offers an illustration, arising out of the common exercise of governmental powers over the same subject matters by the Federal and the State governments; and it may be impossible to frame any doctrine, as to this joint exercise of the common power by different governments, which would relieve the subject of its perplexities. We respectfully submit, however, that the powers of the States, so far as they concern in any way the federal relations, are as much the result of the act of *the people of the United States*, making and adopting the Constitution reserving them, as are the powers granted by the Constitution to the Federal Government. In the exercise of powers over subject matters lying also within the power of the Federal Government—concurrent powers—the States in a very substantial sense act for and on behalf of the people in whom the whole sovereignty resides—the people of the United States. True, the States so act, in the exercise of these concurrent powers, in the character of a subordinate agency of government, but still an agency of the same

people—the people of the United States. The acts of these subordinate agencies of the same sovereignty, in respect to these subject matters, may be subject to the acts of the superior agency—but the acts of both agencies are the acts of the same sovereign. When the States, therefore, representing the sovereignty of the people of the United States, have acted upon one of these subjects of concurrent power—subjects always affecting the federal relations in a greater or less degree—it is the people of the United States who have acted—the same people represented by the superior agency of the Federal Congress. The Constitution mentions only one people—the people of the United States. It knows no people of Pennsylvania, or people of New York. As to these subjects of federal concern at least, we have not forty-four different peoples, with forty-four diverse and hostile governments, with a common jurisdiction over the same thing—we have but one people, one sovereignty residing in that people, acting, it is true, by different agencies, sometimes by the agency of the individual State, and again by the agency of the Federal Congress, superior always in matters of Federal concern. When we speak, therefore, of States having a concurrent power with Congress in such local matters as the improvement of rivers and harbors, it is intended that the people of the United States, the one sovereignty, act as to such matters by the local government as well as by the Federal Congress; not that two hostile and independent powers, representing different peoples and different sovereignties act upon the same thing, sometimes one and sometimes the other, and that one is a superior sovereignty to the other; we mean that the same people have different agencies, and this is all we can mean.

When, therefore, the inferior agency of the people has acted, and the superior agency steps in to accept the results of such act, for and on behalf of the same people by whose authority it was done—though done by an inferior agency—so far as the property of the individual citizen is involved, the people, *always the same*, ought to be bound by whatever agency it acts, and when its superior agency takes possession of the private investment, secured to that people by the act of an inferior agency, and abolishes the terms by which the investment has been so secured, it is clearly a

taking for public use, to be done only upon making just compensation. It is not a predatory incursion of a superior State upon a weaker, but (speaking in reference to this case) it is still the people of the United States, by its superior agency, abolishing the terms upon which the inferior agency has secured the dedication of private capital for the use of that people; the same people, on behalf of whom the private investment was secured, get the use, free of the conditions of the dedication. The dedication being to the people, that people cannot by any agency, State or Federal, accept the dedication, and reject the only terms upon which it could have been made. The unity of the principal—of the sovereignty—behind these governmental agencies ought to be considered in establishing private right in its relation to either. If it is so considered, we think it would tend greatly to solve many of the difficulties necessarily arising upon the theory that the State is an independent sovereignty, representing a people different from the people of the United States—the people represented by the Federal Congress, and the only people known to our Constitution.

Neither the argument of the Attorney General, nor the brief filed on behalf of the Coal Exchange, undertakes to explain how the property of the Monongahela Navigation Company can be put beyond the guaranty of the Federal Constitution in respect of private property, and the property of railroads, canals, turnpikes, wharves and docks, be within the guaranty of the Constitution.

The only jurisdiction that Congress has at all over a navigable river is *as an instrumentality of inter-state commerce.* It has no jurisdiction merely because it is a river, or a natural channel of trade, but only, and solely, because it may be, and is used for the transportation of inter-state traffic. Its jurisdiction in the premises is its jurisdiction over inter-state commerce, and nothing else. It has precisely the same jurisdiction over all other instrumentalities—over the railroad, the canal and the turnpike *carrying inter-state traffic*; over the telegraph carrying inter-state communications; over the improved wharves and docks handling inter-state commerce. The conducting of each one of these instruments is *a franchise held from the State.* Public roads, public highways, public wharves are conducted by individuals only by the license

of the sovereign. In consideration of the franchises granted by the State in the operation of these instruments, millions and millions of private capital are now invested in their construction and use, and the inter-state commerce carried by them far exceeds that carried upon all navigable rivers from Maine to Oregon. If the individuals, who have invested their private capital in these enterprises, have no valid franchises to conduct the same as against the United States, it necessarily results that unnumbered millions of the private property of this country are placed beyond the protection of the fifth amendment to the Constitution, and are subject to confiscation by Congress, in the exercise of its power to regulate the inter-state traffic carried over the subjects of this investment.

We are perfectly aware, and freely concede, that the possible abuse of a political power is not a valid argument to show that such power does not exist. But this consideration offers no answer to our suggestion. We do not argue that the power does not exist, because of the possibility of its abuse, but we do confidently contend that the power does not exist, because to so hold would be to place an enormous mass of the private property of the United States beyond the protection of the constitutional guaranty. It cannot be soberly contended that such a result ever was intended.

The fifth amendment was insisted on by the people after the adoption of the Constitution, and as a condition of such adoption, because of the possibility of abuse of the powers granted in that instrument, and for the protection of private property against such possible abuse. And undoubtedly it was intended that the guaranty should cover *all private property*, the smallest amount, as well as the greatest bulk. And it certainly never could have been intended that, in the exercise of any power, perhaps one-half of the private property of the country should be excluded from the protection of the amendment.

This view of the question has been well put by the Supreme Court of Connecticut in *Kellogg vs. Union Company*, 12*th Conn.*, 6, a case cited with approval by this Court in *Huse vs. Glover*, and in several other decisions. In speaking of the contention, made here by the Appellee, the Connecticut Court says:

"And here it would be observed, that if the positions here advanced be correct, there has been, it is believed, a strange misapprehension on the part of the States in regard to their powers over the navigable waters within their respective jurisdictions. According to the argument, the legislation of the general government when once exercised upon this subject is exclusive. Let Congress only establish a port of entry upon any navigable river within a State, and all power to improve the navigation of that river; to erect a bridge, or establish a ferry across it; to regulate port duties; to enact quarantine laws is forever taken from the States.

"Was it the intent of the framers of the Constitution, it may be asked, under the clause empowering Congress to regulate commerce, to invest it with such extraordinary powers? And was it the intention of the States, so unqualifiedly to surrender to the general government one of the most important attributes of sovereignty? This supposition is repelled, by the whole current of State legislation. *There is not, it is confidently believed, a single State lying upon navigable waters, or having a navigable river within its limits, that has not enacted laws in direct opposition to the principle now contended for.*"

"Take, for example, the quarantine regulations of our own State, &c. * * * * * * * * *

"Again; Congress has power, under the Constitution, to establish post offices and post roads; and there is, perhaps, no power, that has been more frequently, or more extensively exercised. And hardly less extensive has been the legislation of the States, incorporating turnpike companies, and empowering them to exact tolls, not only upon merchandise, but upon vehicles transporting the United States mail. The power of the States to do this has never been doubted; and was, indeed, conceded in the argument. Nor has it ever been questioned, that a State has power to construct a canal within its territory, and to impose a toll upon merchandise transported upon it. And is there any well founded distinction between these cases, and the one now under consideration?

"A distinction was indeed, taken at the bar. It was said that these are *artificial* channels of communication; but that a river is a *natural* one, and open of right to all. This is true; and it is equally true, *that the title to this natural channel of communication is in the State; and that it constitutes a portion of its territory.*

East Haven vs. Hemingway, 7 *Conn. Rep.*, 186.
Middletown vs. Sage, 8 *Conn. Rep.*, 221.
Hollister vs. Union Company, 9 *Conn Rep.*, 436.
Chapman vs. Kimball, 9 *Conn. Rep.*, 38.
Kent's Com., 492.
Lansing vs. Smith, 8 *Cowen*, 146.

"The argument, then, involves this palpable absurdity, that although a State may construct a turnpike road, leading from one post office to another, and impose a toll upon all vehicles passing over it; yet it has no power to improve a natural channel of communication, within its territory, and to which it has an undoubted title, and to impose a toll upon merchandise passing to and from a port of delivery.

"*The argument, indeed, goes the entire length of putting an end to all improvement of their navigable waters, on the part of the States;* and sweeps from their statute books all the legislation upon this interesting subject. We are not prepared to sanction a doctrine which leads to such consequences. We do not think that the clause in the constitution giving to Congress the power to regulate commerce with foreign nations and between the States, divests the States of all power over their own navigable waters. Nor do we think that when Congress does legislate on this subject, their legislation is necessarily, and of course exclusive; but that the States may, notwithstanding, enact laws for the improvement of navigable rivers within their respective territories. For although such enactments may, incidentally, affect commerce, yet they are not a regulation of commerce; nor are they adopted by the States, in virtue of any supposed power to regulate commerce. They are mere municipal regulations, and whenever

adopted, the question arises—and it is one to be settled by the judicial tribunals—whether they do in fact conflict with the laws of Congress. If they do so conflict they must undoubtedly yield.

"In these positions we think we are fully sustained by the powers at all times claimed and exercised by the States; by their uniform course of legislation; by the acquiescence of the general government and by the adjudications on this subject."

The same Court, in a case also cited with approval by this Court, *Thames Bank vs. Lovell*, 18 *Conn.*, 499, speaking of the same subject, said:

"The state has not attempted to regulate commerce upon this river. It has only, by virtue of its original powers, through the agency of a corporation, created by itself, rendered navigable, by a certain description of vessels, a river which was not navigable before, and has to all licensed vessels and others, extended facilities of commercial intercourse beyond what existed before. This it has done by virtue of the same authority by which it constructs roads, bridges, ferries and canals. And laws establishing these latter, says Johnson, J., in the case referred to, (*Gibbons vs. Ogden*, 9 *Wheat.*, 235,) 'are in fact commercial facilities for which, by the consent of mankind, a compensation is paid, upon the same principle that the whole commercial world submit to pay light money to the Danes.' *These acts, improving rivers, constructing roads, &c., will never be complained of as interfering with the rights and powers of Congress. The tolls alone are the subject of complaint. But these are only the fair equivalent for privileges which the State had a right to create, and without which these privileges could never have existed. Commerce, therefore, has not been crippled by the tolls, as the Defendant claims, but has been extended by them. The legislature of the State creating this corporation, with its duties and its privileges, has come in aid of the powers of Congress.*

It seems to be admitted, that States may construct canals, turn-pikes, bridges, &c., and impose tolls upon passenger and freight, as a remuneration for the improvements; and that this may be done without interfering with the power of Congress to regulate commerce among the States, or its power to establish post offices and post roads. We have not been able to discover a sound distinction between these cases and the one we are considering. Congress has the same power to regulate commerce upon the land as upon the water. A river, to be sure, is a natural channel; but if it is not a navigable one, it can no more be used for the purposes of commerce than the land; and therefore to convert it from the mere natural channel into a public highway, for commercial purposes, and to levy a toll to reimburse the expense, no more conflicts with the powers of Congress over the commerce of the country than the construction of a canal, or a turnpike, for the same purposes, with the same tolls. And this, we think, is equally true of rivers, which are only navigable to a partial and limited extent, and by artificial and expensive means, are rendered navigable to a greater extent with a reasonable toll levied upon those only who receive the benefit of the extended navigation. *The principal is the same in both the cases stated.*"

The only publicist, we have been able to find, who has attempted a distinction between the improvement of a river, so as to make it a highway of commerce, and the improvement of the surface of the earth, so as to make it a highway in the shape of a turn-pike road, is Judge Hare in his book on American Constitutional Law, Vol. 1, page 486; and the distinction he attempts to make, it seem to us, is totally inadequate.

The learned writer says:

"We here touch the question of internal improvement, which forms a part of the debatable ground that has been fought over by the opponents and advocates of a liberal interpretation. The improvement of a navigable river would seem to be analagous in this regard to the

construction of a highway or railroad from State to State, or as a means of access to the seaboard; and if the commercial power includes either, it must seemingly cover both. It is obvious, nevertheless, that in view of the spirit of the Constitution, and the objects which its framers had in view, the United States should not adopt any measure that does not concern the entire Union, or that may be adequately carried into effect by the States. Tried by this test, the removal of obstructions to navigation will ordinarily devolve on the general government, while highways may be effectually provided for by local legislation. Such accordingly has been the practice from the outset, where the circumstances do not, as in the case of the Cumberland road, and the Union Pacific Railway, constitute an exception to the general rule. *The question is political*, as depending on the exercises of a discretionary power, and does not fall within the judicial province."

This is the only place indeed where any attempted distinction by any writer can be found; and even the distinction so drawn is left as a political one, and not a legal one. The distinction itself, in view of the facts in the case at bar, is wholly insufficient. How can it be said that the improvement of the Monongahela river concerns the entire Union, and the construction of the Pennsylvania Railroad, from the Delaware to the Ohio, does not? Or, is it not an admitted fact that the improvement of the Monongahela river has been adequately carried into effect by the State? How the one enterprise therefore is peculiarly the subject of Federal power, and the other of State power, is not at all manifest. The building of a railroad carrying millions of passengers, and millions of tons of freight, from the Delaware to the great west, has required the expenditure of a capital of over two hundred millions. The improvement of the Monongahela river has been adequately made at an expenditure not exceeding five millions. The distinction while left as a political one may be harmless; but to gravely assert it as a test, by which the legal powers of the United States, and States, are to be measured, over the subject matters referred to, is frivolous. There is no distinction. If the State of Pennsylvania cannot grant a valid franchise to the Monongahela Navigation

Company, against the United States, for the creation of an artificial highway in the river, it cannot grant a valid franchise as against the United States, for the construction, for carriage of inter-state traffic, of a railroad from the river Delaware to the river Ohio. If the one improvement can be taken without compensation by the Federal power, so may the other.

Such a doctrine would utterly paralyze all local enterprise, and if it had ever been before so thought or held, the magnificent highways that we now have *under State action*, by means of which the great mass of our inter-state traffic is done, could never have been built. The persons who invested their private capital in these enterprises which have proved so beneficial to the entire country, certainly did not think that they were abandoning their money to the United States, whenever it saw fit to step in and take it; or that they were putting their private property outside of the protection of the constitutional guaranty. No one has ever thought so, until certain citizens of Pennsylvania, mining coal on the Monongahela river, conceived the idea of throwing the burden of maintaining, for their special use, the artificial navigation of that stream upon the people of the United States, and thus enable them to reap greater profits from the trade.

Politically speaking, there is no more reason why the man who ships coal, over the artificial navigation created in the Monongahela river, should not pay toll, than why the man, who travels from Chicago to Philadelphia, should not pay railroad fare. The government of the United States, as a government, has no more interest in the one question than in the other. The greed of the Pittsburgh coal men has created the pretence that their is such an interest.

WAYNE MacVEAGH,
THOS. D. CARNAHAN,
JOHNS McCLEAVE,
Atty's for Appellant.